Office-Supreme Court, U.S.
FILED
AUG 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER;
AND RONALD K. DESOUZA, VICE PRESIDENT OF
STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTION PRESENTED

When a claim of public employer discrimination is brought under 42 U.S.C. §1983, and related civil rights statutes, is a federal appeals court free to disregard state policy, clearly reflected in its statutes and common law, that favors abbreviated limitations periods in public employment disputes and to reject such limitations periods because they govern state administrative actions or because they are too short?

PARTIES

The parties to the proceeding in the court of appeals were James R. Grattan and Adrienne S. Hedman, as appellants, and Calvin W. Burnett, President of Coppin State College; J. Carson Dowell; Edmund C. Mester; and Ronald K. DeSouza, Vice-President of Student Affairs, Coppin State College, as Appellees.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES	i
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING REVIEW:	
I. Review By This Court Is Necessary To Correct A Decision That Both Undermines The Legitimate And Long-Recognized Policy Of Most States Requiring Prompt Assertion And Resolution Of Public Employee Disputes And Clearly Departs From Cases Of This Court	7
II. The Deep Division Among The Lower Courts On This Critical Question Which Resulted In The Unsanctioned Holding Below Should Be Resolved By This Court	15
CONCLUSION	22
APPENDIX A	APP. 1
APPENDIX B	APP. 16

TABLE OF CITATIONS

Cases

Austin v. Board of Higher Education, 186 N.Y.S.2d 1 (1959)	14
Beard v. Robinson, 563 F.2d 331 (7th Cir. 1977)	19
Bishop v. Wood, 426 U.S. 341 (1976)	13

Board of Regents v. Tomanio, 446 U.S. 478 (1980) ..... *passim*

Burns v. Sullivan, 619 F.2d 99 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) 17, 18

Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982) 18

Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976) 16, 17

Darlene S. Cohen v. F. Carvel Payne And The State Of Maryland, Cir. Ct. For Anne Arundel County Law No. 1105000 (Order Filed April 20, 1983) 13

Del Costello v. International Brotherhood Of Teamters, 51 U.S.L.W. 4693 (June 8, 1983) 14

Dewey v. University Of New Hampshire, 694 F.2d 1 (1st Cir. 1982) 18

Dillon v. Great Atlantic And Pacific Tea Co., 43 Md. App. 161, 403 A.2d 406 (1979) 11

Duffey v. Rickard, 194 Md. 228, 71 A.2d 41 (1950) 6, 12

Evans v. Chesapeake And Potomac Telephone Company, 535 F. Supp. 499 (D. Md. 1982) 4

Garcia v. University Of Kansas, 702 F.2d 849 (10th Cir. 1983) 18, 20

Garmon v. Foust, 6687 F.2d 400 (8th Cir.), *cert. denied*, 102 S. Ct. 2283 (1982) 20

Gray v. Warden, 247 Md. 727, 234 A.2d 603 (1967) 12

Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945) 11

Holden v. Massachusetts Com'n. Against Discrimination, 671 F.2d 30 (1st Cir.), *cert. denied*, 103 S. Ct. 97 (1982) 18, 19

PAGE

Hussey v. Sullivan, 651 F.2d 74 (1st Cir. 1981) 18

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 7

Mason v. Owens-Illinois, Inc., 517 F.2d 520 (6th Cir. 1975) 16

McGill v. General Electric Co., 524 F. Supp. 1126 (D. Md. 1981) 4

McNutt v. Duke Precision Dental And Orthodontic Laboratories, Inc., 698 F.2d 676 (4th. 1983) 5, 6, 16, 18

Miles v. Stevenson, 80 Md. 358 (1894) 11

Myers v. Chief Of Fire Bureau, 237 Md. 583, 207 A.2d 467 (1965) 12

Peterson v. Fink, 515 F.2d 815 (8th Cir. 1975) 19

Robertson v. Wegmann, 430 U.S. 584 (1978) 14

Shah v. Halliburton, 627 F.2d 1055 (10th Cir. 1980) 20

Shaw v. McCorkle, 537 F.2d 1289 (5th Cir. 1976) 19

Springfield Township School District v. Madelin H. Knoll, 699 F.2d 137 (3rd Cir. 1983), reh. denied, 699 F.2d 137 (3rd Cir. 1983), petition for cert. filed, No. 82-1889 .....13, 14, 15, 20

State Department Of Assessments v. Clark, 281 Md. 385, 380 A.2d 28 (1977) 12

Swyka v. Johnson, U.S. Supreme Ct., petition for cert. filed, No. 82-1928 ..... 14, 15

United Parcel Service v. Mitchell, 451 U.S. 56 (1981) 5, 16

Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975), *cert. denied*, 423 U.S. 855 (1975) 8

PAGE

Waters v. Wisconsin, Steelworks Of International Harverster Co., 427 F.2d 476 (7th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 16

White v. United Parcel Service, 692 F.2d 1 (5th Cir. 1982) 18

Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978) 16

Constitutional Provisions, Statutes And Rules

United States Constitution—

First Amendment 2, 3

Fourteenth Amendment 2, 3

United States Code:

42 U.S.C.—

§ 1981 ..... 2, 3, 5, 7

§ 1983 ..... *passim*

§ 1985 ..... 2, 3, 7

§ 1986 ..... 2, 3, 7

§ 1988 ..... 2, 6, 8

§ 2000e-5 ..... 4, 14

Annotated Code of Maryland:

Courts and Judicial Proceedings Article—

§ 5-101 ..... 2, 7

Education Article—

§ 6-202 10

§ 13-1A-01 10

§ 14-110 10

Article 27—

§ 721 9

§ 734 9

PAGE

Article 49B—

§ 9 ..... *passim*

§ 10 2

§ 12 2

Article 64A—

§ 33 ..... 2, 9

§§ 52-54 2

Chapter 376, Laws of 1983 ..... 2, 13

Rules and Regulations:

Code of Maryland Regulations—

COMAR 06.01.01.60 ..... 2, 9

Maryland Rules of Procedure—

Rule B4a 2, 9

Rule BE44 12

Rule BF 12

Miscellaneous

Annot.: Acquiescence Or Delay As Affecting Rights Of Public Employees Illegally Discharged, Suspended Or Transferred, 145 A.L.R. 767 (1943) And A.L.R. Supplements 9, 14

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ON PETITION FOR WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

Calvin W. Burnett, President of Coppin State College, et al. pray that a writ of certiorari issue to review the judgment entered in this case on June 22, 1983, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit has not yet been reported; it is set forth

in the Appendix to this Petition at App. 16. The opinion and order of the District Court for the District of Maryland is not reported; it is set forth in the Appendix to the Petition at App. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, First Amendment

United States Constitution, Fourteenth Amendment

42 U.S.C. §1981

42 U.S.C. §1983

42 U.S.C. §1985

42 U.S.C. §1986

42 U.S.C. §1988

Maryland Annotated Code:

Courts and Judicial Proceedings Article, §5-101

Article 49B, §§9, 10, 12

Article 64A, §33

Article 64A, §§52-54

Session Laws: Chapter 376, Laws of 1983

Code of Maryland Regulations: COMAR 06.01.01.60

Maryland Rules of Procedure, Rule B4

These provisions are set forth in the Appendix at App. 1-15.

STATEMENT OF THE CASE

In June, 1976, administrators at Coppin State College, a predominantly Black, publicly-funded institution governed by a State board, determined not to renew the employment contracts of two untenured administrative employees, the Respondents herein, James R. Grattan and Adrienne S. Hedman (hereafter "the employees"). Shortly thereafter, these employees filed claims of racial discrimination with the Equal Employment Opportunity Commission. Hedman also alleged that she was the victim of sex discrimination.

Seven months later, on February 17, 1977, they brought suit in State court against Petitioners herein, Calvin W. Burnett, the President of Coppin State College, and various other college and state officials (hereafter "the State"). The employees asked the State court to declare, under the Maryland Uniform Declaratory Judgment Act, Md. Code, Courts and Judicial Proceedings Article §§3-401–3-415, that the non-renewal of their employment contracts in June of 1976, had been accomplished in a manner that violated State law and their rights to procedural due process. The State demurred to the Bill of Complaint.

After the demurrer was finally ruled on in 1981 and sustained with leave to amend, the employees filed, on October 13, 1981, an "Amended and Supplemental Bill of Complaint." The amended complaint alleged that both employees were victims of racial discrimination in violation of 42 U.S.C. §§1981, 1983, 1985, 1986 and the Fourteenth Amendment of the United States Constitution and were retaliated against for exercise of their First Amendment rights. Hedman also alleged civil rights claims based on sex discrimination. In response to this new complaint, the State removed the entire case to the United States District Court for the District of Maryland.

At that time, already pending in district court were two separate actions (outgrowths of the EEOC complaints) filed by these same employees against the same defendants claiming unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

The State agreed to consolidate the cases and moved to dismiss all three as untimely filed. The District Court (Judge Norman P. Ramsey), however, refused to consolidate or to dismiss the Title VII cases and these are still pending in the District Court. App. 40. However, the court did dismiss the removed case in its entirety. The court reasoned that rights and remedies provided by Maryland's Human Relations Law (Article 49B) were most analogous to the asserted federal claims and thus, the limitations period most appropriate for adoption by the district court was Article 49B, §9(a), which requires all employment discrimination complaints to be filed with the Maryland Commission on Human Relations within six months of their occurrence.[1] Since the federal claims were not brought within this period, they were dismissed as not timely filed.[2]

The employees appealed and the United States Court of Appeals for the Fourth Circuit reversed. First, relying

[1] In so doing, the district court followed several earlier Maryland cases involving suits brought under § 1981. *See e.g., McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981). At the time, the Maryland District Courts, like other courts throughout the country, (see Argument, Section II, infra) were divided on the question of whether time periods specified in state fair employment practices laws should serve as limitations periods in federal civil rights actions. *See Evans v. Chesapeake & Potomac Telephone Company*, 535 F. Supp. 499 (D. Md. 1982).

[2] The District Court ruled that the employees' free speech claim was governed by a three-year limitations period but held it barred as well since it was not raised until 1981 and therefore did not relate back to the 1977 complaint. The employees did not appeal this holding to the Fourth Circuit.

upon *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 678 (4th Cir. 1983), the court below held the six-month statute of limitations prescribed in Article 49B, §9(a) was not applicable. In *McNutt*, a case decided by another panel of the Fourth Circuit a few weeks prior to oral argument in this case, the court had concluded that Art. 49B §9(a) should not be applied to a private employee's claim of racial discrimination brought under 42 U.S.C. §1981, because the "mixed scheme of administrative and judicial enforcement" in Article 49B was not analogous to a judicial action brought to enforce §1981. 698 F.2d at 678.

In urging the Fourth Circuit to apply §9(a) in the case at hand, the State pointed out, *inter alia*, that the present case, unlike *McNutt*, involved a public, rather than private employee and that the *McNutt* panel had expressly recognized that the policy reasons supporting prompt assertion and prompt resolution of public employee "controversies over discharges, demotions and failures to promote or transfer" were "particularly" acute. 698 F.2d at 678. Further, the State noted that the *McNutt* panel had reached its view that federal courts can only borrow state limitations periods which provide the plaintiff with a purely *judicial* remedy without reference to this Court's decision to the contrary in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Even though the employees offered no response to these arguments, the lower court rejected them without comment.

The court below also refused to apply other abbreviated limitations periods urged by the State — limitations periods of precisely the sort which the *McNutt* panel had indicated would be applicable in federal civil rights actions. The *McNutt* court concluded that there was no indication that the Maryland legislature intended the six-month limitation period found in Article 49B §9(a) to be applied to other types of judicial actions involving

private employees: "No Maryland statute specifically addresses the matter" and there is no "decision or body of decisions on the subject" in Maryland. 698 F.2d at 679. However, the *McNutt* court said that if there had been such evidence of state intent, it would have applied a short limitations period: "Had there been in Maryland a decision or body of decisions on the subject . . . we would probably accept them as the common law of the State of Maryland" and apply them pursuant to 42 U.S.C. §1988. 698 F.2d at 679.

The state argued below that in a case involving a public employee, there are both statutes and common law which do, in the words of the *McNutt* panel, "specifically address the matter." Petitioners pointed to a wide body of Maryland statutes and regulations providing public employees their own administrative *and* judicial forum to challenge a discharge by their public employer — all within abbreviated limitation periods, *see infra* at 9-10, as well as an established common law of Maryland requiring a public employee to assert his employment dispute in court in an expeditious fashion. *See Duffey v. Rickard*, 194 Md. 228, 71 A.2d 41 (1950) (5½ months).

The employees' only response was to argue that these statutes and case law do not apply to them because they are not merit system employees. The Fourth Circuit, however, did not reject the statutory and common law limitation periods for public employment disputes on this ground. Rather the court concentrated simply on the length of the limitation periods, noting twice in the space of two paragraphs that these periods were "even shorter" than the period rejected in *McNutt*. App. at 20. The Court then made its own independent and conclusory assessment of the "intent" of the Maryland legislature and found that even though abbreviated limitations periods were mandated by statutes and case law governing the rights of public employees, the legislature could not have

"intended" that a limitations period of this brevity be applied "to civil actions for discrimination." App. at 20.[3] Accordingly, the Court held that the general limitations period of three years for actions for which no other period is specifically provided, Maryland Code, Courts & Judicial Proceedings Art. §5-101, should be applied in "discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment." App. 21.

REASONS FOR GRANTING REVIEW

I.

REVIEW BY THIS COURT IS NECESSARY TO CORRECT A DECISION THAT BOTH UNDERMINES THE LEGITIMATE AND LONG-RECOGNIZED POLICY OF MOST STATES REQUIRING PROMPT ASSERTION AND RESOLUTION OF PUBLIC EMPLOYEE DISPUTES AND CLEARLY DEPARTS FROM CASES OF THIS COURT.

Since Congress did not establish a statute of limitations for actions brought under 42 U.S.C. §1983 and similar civil rights statutes,[4] federal courts are generally required to borrow the state statute of limitations governing an analogous cause of action. *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980). *See also, Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In most cases, the state statute of limitations for the most

[3] The Fourth Circuit also rejected the State's alternative argument that the employees claims of race and sex discrimination first raised in their 1981 complaint did not "relate back" to the 1977 complaint and so were not timely filed even if a three-year limitations period was applicable. App. 22. The state does not pursue that argument before this Court.

[4] Respondents below pressed claims under 42 U.S.C. §§ 1981, 1985 and 1986, as well as § 1983, and all of these were dismissed as untimely by the District Court. However, for the sake of simplicity in argument and because a federal court's approach to limitation issues under these statutes would not ordinarily be expected to vary from one statute to another under 42 U.S.C. § 1988, Petitioners will principally refer to § 1983 throughout their petition.

analogous state cause of action is the "binding rule of law" in federal civil rights actions, which can be disregarded only if "inconsistent with the Constitution and laws of the United States." *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 and 42 U.S.C. §1988.

Both of these inquiries — the question of what state cause of action for which there is a limitations period is most clearly analogous to the federal civil rights claim and the question of whether that limitations statute is inconsistent with the United States Constitution and federal law — are grounded in considerations of comity and federalism. *See Board of Regents v. Tomanio, supra,* 446 U.S. at 492 ("Considerations of federalism are quite appropriate in adjudicating federal suits based on 42 U.S.C. §1983"). This is so as to the first inquiry because "[t]he ultimate goal is to apply the same limitations period to the federal civil rights action as would be applied if a similar action were brought in state courts." *Warren v. Norman Realty Co.,* 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied,* 423 U.S. 855 (1975); and as to the second, because in order to "gauge inconsistency," a federal court must first identify and thus compare the "federal and state policies which the respective legislatures sought to foster." *Board of Regents v. Tomanio, supra,* 446 U.S. at 487.

The Court of Appeals below mishandled both of these inquiries. In particular, it ignored its duty to place itself in the position of a state court judge and to determine the appropriate state limitations period with full consideration of state statutory and common law and the policies they reflect. In addition, it, in effect, found "inconsistency" without even attempting to articulate the state policies harmed by its decision. This would and should have been a very easy task.

The courts of at least 35 states, including Maryland and the District of Columbia, have had no trouble in articu-

lating a common law rule requiring the employment disputes of public employees to be promptly asserted and promptly resolved. *See,* Annot.: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) (and A.L.R. Supplements) which collect more than 100 cases on the subject — some going as far back as 1879.

The Legislatures of most states obviously share this view that public employees should promptly assert grievances and legal actions against their employers, including those involving discrimination charges. For example, Maryland law sets up a scheme under which a classified state employee has 165 days to challenge a termination. *See* Md. Code., Art. 64A, §33.[5] Even unclassified state employees have a specific remedy for an alleged illegal, discriminatory or unconstitutional termination which must be asserted and appealed to court in an even shorter period — 95 days. Code of Maryland Regulations COMAR 06.01.01.60.[6] And Maryland has a host of other statutes which require that various classes of public employees' employment disputes be promptly resolved — Article 27 §§721 and 734 (Law Enforcement

[5] Article 64, § 33 of the Maryland Code provides that when a classified employee (one covered by the State Merit System) is to be terminated or "permanently removed from the classified service," written charges must be filed against him and he must be given an opportunity to be heard in his own defense. *See also* COMAR 06.01.01.61. These charges must be heard within ninety (90) days after filing and a decision on them must be rendered within forty-five (45) days after the hearing. Thereafter, an appeal is permitted to the Circuit Court within thirty (30) days. Md. Rule of Procedure B4.

[6] An unclassified employee who receives a notice of termination has five working days to note an appeal to the Secretary of Personnel who must hear the case within 30 days and render a decision within another 30 days. Thereafter, an appeal to the Circuit Court must be filed within another 30 days. Md. Rule of Procedure B4.

Officers); Education Article §6-202 (Teachers and Principals), §13-1A-01 *et seq.* University of Maryland Employees), §14-110 (Board of Trustees of State Universities and Colleges Employees).

Most significantly, Maryland shares with most states — at least 30 — the establishment by legislation of an abbreviated period for the filing of claims of employment discrimination with a state fair employment practices agency. In Maryland, that period is 6 months. *See* Md. Code, Article 49B, §9(a). Many states have the same filing deadline; some have an even shorter period.[7] Yet, in the

[7] *See* ARIZ. REV. STAT. ANN. § 41.1481 (six-month limitation; employment discrimination); COLO. REV. STAT. § 24-34-403 (six-month limitation; employment discrimination); CONN. GEN. STAT. 31-127 (90-day limitation; employment discrimination); DEL. CODE ANN. Tit. 19, § 712 (90-day limitation; employment discrimination); FLA. STAT. ANN. § 23.167 (six-month limitation; employment discrimination); GA. CODE ANN. § 89-1714 (six-month limitation; employment discrimination); HAWAII REV. STAT. § 378-4 (90-day limitation; discrimination action); ILL. REV. STAT. ch. 68 § 7-102 and 103 (180-day limitation; civil rights violation); IND. CODE ANN. § 34-4-16.5-7 (180-day limitation; political subdivision claim); IOWA CODE ANN. § 601 A.1512) (180-day limitation; employment discrimination); KAN. STAT. ANN. § 44-1005 (six-month limitation; employment discrimination); KY. REV. STAT. 344.200 (six-month limitation; employment discrimination); ME. REV. STAT. ANN. Tit. 5 § 4611 (six-month limitation; employment discrimination); MASS GEN. LAWS ANN. ch. 151B § 5 (six-month limitation; employment discrimination); MICH. STAT. ANN. § 3.548 (601) II(b) (90-day limitation; employment discrimination); MINN. STAT. ANN. § 363.06 (six-month limitation; employment discrimination); MO. ANN. STAT. § 296.040 (180-day limitation; employment discrimination); MONT. CODE ANN. § 49-2-501 (six-month limitation; employment discrimination); NEB. REV. STAT. § 18-1118 (six-month limitation; employment discrimination); NEV. REV. STAT. § 613.430 (six-month limitation; employment discrimination); N.H. REV. STAT. ANN. § 354-A:09 (90-day limitation; discrimination actions); OKA. STAT. ANN. Tit. 25 § 1502 (six-month limitation; employment discrimination); PA. STAT. ANN. Tit. 43, § 960 (90-day limitation; discrimination

face of all this authority to the contrary, the lower court was able to conclude that the Maryland General Assembly "intended" that public employees were to have three years before beginning to litigate a claim of employment discrimination.

What would the lower court have found if it had placed itself in the position of a Maryland Court facing the same discrimination claims brought without resort to the federal civil rights statutes? It would have found that a public employee bringing a claim for a discriminatory firing would have had to file a mandamus action in state court or pursue his or her statutory or administrative remedies.

As to the first remedy, mandamus, in Maryland, this action has as its purpose to correct the abuse of governmental power, particularly illegal, arbitrary and even unconstitutional action. Since the 1850's it has served as a legal route for a public officer or employee to challenge his ouster and regain his position. *See e.g., Miles v. Stevenson,* 80 Md. 358 (1894). Unlike a state court action for private employment discrimination, which would require express statutory authority, *Dillon v. Great Atlantic and Pacific Tea Co.,* 43 Md. App. 161, 403 A.2d 406 (1979), no legislative authorization is needed to confer such a private right of action on a public employee via mandamus. *See, Heaps v. Cobb,* 185 Md. 372, 45 A.2d 73 (1945). (Maryland courts have inherent power by way of mandamus or otherwise to review arbitrary or illegal

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actions); R.I. GEN. LAWS § 28-6-10 (four-month limitation; employment discrimination); S.C. CODE ANN. § 65-2D(1) (six-month limitation; employment discrimination); S.D. CODIFIED LAWS § 20-13-31 (180-day limitation; discrimination action); TENN. CODE ANN. 4-21-117 (180-day limitation; discrimination action); UTAH CODE ANN. 34-35-7(15) (30-day limitation; discrimination action); W. VA. CODE § 5-11-10-90-day limitation; discrimination action); WYO. STAT. § 27-9-106 (90-day limitation; employment discrimination).

governmental action.) And mandamus is an action at law which, like 42 U.S.C. §1983, offers a damage remedy, Maryland Rule BE44, ancillary injunctive relief, Maryland Rule BF, and the right to a jury trial.

If such an employee had brought his or her mandamus action in a reasonably prompt manner, there would be no bar to relief if the claim had merit. However, if the plaintiff, like the respondents in this case, waited nearly eight months before going to court, his or her claim would be barred by laches under the Maryland decision in *Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950) (Public employee suit time-barred after 5½ months.)

On the other hand, if the plaintiff had access to public employee grievance remedies or claimed employment discrimination proscribed by Maryland's Human Relations Law (Art. 49B), his or her mandamus remedy would be barred by the existence of such alternate remedies. *See Gray v. Warden,* 247 Md. 724, 234 A.2d 603 (1967) (correction guard entitled to removal proceeding under §33 of Article 64A may not obtain relief by way of mandamus). This would be true even if the public employee claimed that his discharge violated the United States Constitution. *State Department of Assessments v. Clark,* 281 Md. 385, 380 A.2d 28, (1977). The plaintiff's only state judicial remedy would be that provided by the particular statutory or administrative scheme. And failure to abide by the time limitations of the grievance procedures or Article 49B would take away any state court remedy he or she might have otherwise had. *See Myers v. Chief of Fire Bureau,* 237 Md. 583, 589-590, 207 A.2d 467 (1965).

Thus, these statutory deadlines and the laches rule of *Duffey v. Richard, supra,* are genuine bars to a state court discrimination action by a public employee; and they would be applicable in the state court proceeding most

clearly analogous to 42 U.S.C. §1983.[8] The same would be true of the statutes and common law laches rules of most states.[9]

The lower court not only rejected long-standing and widespread state policies in determining what state cause of action was most analogous to 42 U.S.C. § 1983, it ignored them in effectively concluding that the proffered state limitations were too short to be consistent with federal law. This issue is common to those raised in the pending petitions for certiorari in *Springfield Township*

[8] Significantly, in a state court action brought pursuant to 42 U.S.C. § 1983 and alleging discrimination against a public employee, the State made the same limitation argument rejected by the *Grattan* court and the Circuit Court dismissed the plaintiff's civil rights claim. *See Darlene S. Cohen v. F. Carvel Payne and the State of Maryland*, Cir. Ct. for Anne Arundel County Law No. 1105000 (Order filed April 20, 1983).

[9] The lower court not only erred in ignoring clear state policy in favor of abbreviated limitations periods for public employees actions and in masquarading its distaste for the state rule in unsubstantiated statements about the "intent" of Maryland Statutes. It further evidenced its misreading of Maryland law in at least two other respects. The appellate panel said that deadlines for state grievance proceedings could not be applied to judicial proceedings because in such cases the grievances are state-initiated and the state bears the burden of proof and of framing the issues (App. 20). This is simply not true for cases involving the termination of unclassified state employees or other types of grievances. *See* COMAR 06.01.03.05. Secondly, the Court below erred in suggesting that a state employee could file a discrimination complaint with the Human Relations Commission without regard to the time limits specified in employee grievance procedures. At least at the time of the lower court decision and before July 1, 1983, a state employee had to timely initiate a grievance proceeding to assert his or her rights under Article 49B. *See* Chapter 376, Laws of 1983 (App. 14). Under the circumstances, the lower court's reading of Maryland law is not entitled to "great deference". *Bishop v. Wood*, 426 U.S. 341, 346 n.10 (1976).

School District v. Knoll, No. 82-1889, and *Swyka v. Johnson*, No. 82-1928.[10]

This Court, in *Tomanio, required* federal courts to assess the state policies behind limitation statutes in determining "inconsistency" with federal law. And in *Robertson v. Wegmann*, 430 U.S. 584, 593 (1978), the Court said that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." There is nothing "too short" about a six-month limitation period for public employee discrimination cases. Under federal law, a Title VII plaintiff will generally be out of federal court if he did not file a complaint with the Equal Employment Opportunity Commission within six months of the allegedly discriminatory act. 42 U.S.C. 2000e-5(e). And six months is longer than the applicable period in some states for public employee mandamus actions. *See e.g., Austin v. Board of Higher Education*, 186 N.Y.S.2d 1 (1959) (four months); *Anno. — Public Employee — Discharge — Acquiescence*, 145 A.L.R. 767 (1943). In fact, just last term, this Court in a somewhat different context held that a six-month limitations period was an appropriate one for certain disputes between an employee and his union. *Del Costello v. International Brotherhood of Teamsters*, 51 U.S.L.W. 4693 (June 8, 1983). Moreover, it is likely that a discharged public employee is thinking of his or her judicial remedies immediately after being terminated — particularly a potential Title VII plaintiff who only has six months to make up his or her mind to pursue a federal statutory claim. Finally, nothing in such a limitation rule runs counter to the twin purposes of deterrence and compensation reflected in 42 U.S.C. §1983.

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[10] For the reasons set forth by the petitioners in *Knoll* and *Swyka* and set forth *infra* by petitioners herein, the decision of the Court of Appeals for the Fourth Circuit is clearly wrong.

Although this case has much in common with the *Knoll* and *Swyka* cases, it is also different in a number of important respects. Unlike those cases, it involves the vexing question of what state cause of action is most analogous to §1983. Moreover, it involves the application *vel non* of an age-old state common law rule, rather than a brand new statute as is *Knoll* and *Swyka*. And it presents for review the question whether a state limitations period set forth in a mixed administrative-judicial scheme can be applied in a federal §1983 action. In fact, the Respondent in *Knoll*, in arguing against review in that case and against the amicus brief filed by Maryland therein, said:

> "The petition in this case [Knoll] does not present those recurring issues. If the issue presented in this case were to arise in a case that presents those additional questions of more general importance, it might in that context warrant review."

Petitioners submit that *this* is such a case and that review is warranted.

II.

THE DEEP DIVISION AMONG THE LOWER COURTS ON THIS CRITICAL QUESTION WHICH RESULTED IN THE UNSANCTIONED HOLDING BELOW SHOULD BE RESOLVED BY THIS COURT.

The question of whether a state statute of limitations can be rejected by a federal court in § 1983 cases for any reason other than a finding that it does not govern the most analogous state cause of action has caused enormous division among the lower courts. Much of that division centers on two unauthorized approaches to this question. Both were adopted by the court below: *i.e.*, refusal to borrow a state statute of limitations, even though that statute governs the state action most analogous to the federal claim, because (1) an administrative rather than judicial remedy is provided in state law or (2) the federal court determines the state limitations period is simply "too short."

As to the refusal to apply an analogous administrative remedy, a number of courts have refused to apply a state statute of limitations governing administrative remedies, like Maryland Code, Art. 49B, §9(a), to a judicial action brought under the Civil Rights Acts. *See McNutt v. Duke Precision Dental and Orthodontic Laboratories, supra,* 698 F.2d 676; *Zuniga v. AMFAC Foods, Inc.,* 580 F.2d 380 (10th Cir. 1978); *Chambers v. Omaha Public School District,* 536 F.2d 222 (8th Cir. 1976); *Mason v. Owens — Illinois, Inc.,* 517 F.2d 520 (6th Cir. 1975); *Waters v. Wisconsin, Steelworks of International Harvester Co.,* 427 F.2d 476 (7th Cir. 1970), *cert. denied,* 400 U.S. 911 (1970). This approach seems clearly at odds with this Court's teachings in *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 (most analogous state statute of limitations is "binding rule of law" which can be disregarded *only* if inconsistent with the Constitution and laws of the United States) and in *United Parcel Service v. Mitchell, supra,* 451 U.S. at 62 n.3 ("the fact that an employee could not bring a direct suit [in State Court] . . . does not mean that his §301 [federal] claim . . . is not closely analogous to such an action" and so should not be adopted under any circumstances.)

However, whatever may be the merits of refusing to borrow a state administrative statute of limitations for federal actions in other contexts, it seems clearly inappropriate in cases involving charges of discrimination by a public employee. And, in fact, only one circuit, other than the court below, has refused to apply a state statute of limitations on this ground in an employment dispute involving a public employee. *See Chambers v. Omaha Public School District, supra.* Moreover, there the court paid no attention to the fact that Chambers was a public employee and so there was no acknowledgement of a particularly significant state interest in this area. *See supra,* Argument, §1. Perhaps even more importantly, the

Chambers court based its holding, at least in part, on the fact that application of a short statute of limitations in that case would have barred the plaintiff's First Amendment claim. 536 F.2d at 227. Here, of course, there is no contention that any First Amendment claim is barred by the "short" statute of limitations. Thus *Chambers* is clearly distinguishable from the case at hand.

Moreover, the First Circuit in a series of well-reasoned opinions has expressly recognized that in the area of public employment disputes "important policy reasons" require the application of the limitations period governing the state statute protecting the same rights sought to be vindicated by a federal civil rights action, even if that state statute provides only an administrative remedy. In *Burns v. Sullivan*, 619 F.2d 99, 106-107 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) the First Circuit held that a Massachusetts statute, nearly identical to Article 49B, which provided that charges of employment discrimination must be filed with the Massachusetts Human Relations Commission within six months, should be applied in a public employee's suit brought under 42 U.S.C. § 1983. The court explained that to apply a three-year limitations period[11] in § 1983 public employee suits would allow "state employees to bide their time and use the federal courts, bypassing the state administrative hearings" resulting in "two unfortunate results":

> "First, the general government policy, observed at both the state and federal levels, of prompt resolution of personnel disputes, will be thwarted. Second, without any showing that state administrative procedures will not provide the plaintiff

[11] The *Burns* court also specifically noted that a general three-year statute of limitations, like that applied by the Fourth Circuit in the case at hand, should only be applied where the state has *not* "provided a specific remedy, complete with statute of limitations for racial discrimination in public employment." 619 F.2d at 107.

with due process and protect against constitutional violations, the federal courts will become surrogate state personnel departments." 619 F.2d at 107.

The First Circuit has consistently followed and indeed, expanded its holding in *Burns* in a number of recent cases. *See e.g., Dewey v. University of New Hampshire*, 694 F.2d 1 (1st Cir. 1982); *Carter v. Supermarkets General Corp.*, 684 F.2d 187 (1st Cir. 1982); *Holden v. Massachusetts Com'n. Against Discrimination*, 671 F.2d 30 (1st Cir.), *cert. denied*, 103 S. Ct. 97 (1982); *Hussey v. Sullivan*, 651 F.2d 74 (1st Cir. 1981). The Court below totally ignored this authority. Indeed, the Fourth Circuit here not only failed to distinguish these cases but it also failed to even address them. This is particularly anomolous in light of the fact that another panel of the Court only a few months prior to this decision at hand expressly recognized that these First Circuit cases were "respectable authority." *McNutt v. Duke Precision Dental and Orthodontic Laboratories, supra*, 698 F.2d at 678.

Aside from the conflict, the holding below presents with the well-reasoned First Circuit decisions as to the applicability of administrative limitations periods to actions brought under the Civil Rights Acts, its reasoning seriously conflicts with the approach adopted by most lower courts. For the Fourth Circuit in this case seems to have refused to apply the statutory and common law abbreviated limitations periods specifically governing public employee disputes, simply because it found those periods "too short." Not only has this approach been expressly disavowed, *Burns v. Sullivan, supra*, 619 F.2d 106-107 (noting short state limitations period "no shorter than six-month period available to federal and state employees under Title VII"); *see also, Garcia v. University of Kansas*, 702 F.2d 849 (10th Cir. 1983); *White v. United Parcel Service*, 692 F.2d 1 (5th Cir. 1982), but also it has not been adopted even by those federal courts which have

chosen a longer state statute of limitations over a shorter one. *See e.g., Beard v. Robinson,* 563 F.2d 331 (7th Cir. 1977); *Shaw v. McCorkle,* 537 F.2d 1289 (5th Cir. 1976); *Peterson v. Fink,* 515 F.2d 815 (8th Cir. 1975), and cases cited *infra* at 20. Not one of these courts rejected a shorter statute of limitations simply because it was "too short."

If such an approach is permitted to stand it could have an enormous effect throughout the country. At least thirty other states have state statutes of limitations of less than one year which could be applied to civil rights actions brought by employees. *See* n.7, *supra.* Each of these states has made a considered decision in balancing the interests of potential plaintiffs and defendants. The Fourth Circuit's decision here obviously undermines the power given to the states by Congress in 42 U.S.C. §1988.

Significantly, the Court below did not cite a single case in support of its momentous decision not to apply abbreviated limitations periods just because they were "too short."[12] The only other court which has taken such

[12] Moreover, the only reason asserted by the employees for rejecting these limitations periods — *i.e.,* the periods were inapplicable to them because they were not merit system employees — was correctly and soundly rejected by the First Circuit in *Holden v. Comm. Against Discrimination, supra,* 671 F.2d at 33:

> "Holden argues that . . . *Burns* should not apply to her because she does not have available [because, although a public employee, she was not appointed as civil servant] the administrative remedies that are contemplated by the statute applied in those cases. The unavailability of the state administrative remedies does tend to violate the policies observed in *Burns.* . . . Nevertheless, the statutes applied in . . . *Burns* are still the 'most analogous' to Holden's claims, and we see no reason to give her a longer limitations period than that available to other public employees in Massachusetts. We do not think that the decision of the Massachusetts legislature not to give certain public employees such as Holden an administrative remedy entitles them to a longer limitations period."

an unorthodox and unauthorized approach in a public employer dispute is the Third Circuit in a recent case which this Court has been asked to review. *Springfield Township School District v. Madelin H. Knoll*, 699 F.2d 137 (3rd Cir. 1983), *reh. denied*, 699 F.2d 137 (3rd Cir. 1983), *petition for cert. filed*, No. 82-1889 (May 20, 1983). (Interestingly, the respondent there, while opposing grant of certiorari in that case, principally on the theory that it involves a peculiar state statute, concedes that "the decisions of the lower courts are in disarray" with regard to the questions raised in the case at hand. Brief of Respondent in Opposition at 6).

Another recent decision containing language arguably supporting such an approach is *Garmon v. Foust*, 668 F.2d 400, 406 (8th Cir.), *cert. denied*, 102 S. Ct. 2283 (1982) ("we . . . reject the tort analogy because it unduly cramps the significance of Section 1983 as a broad statutory remedy.") However, that case, a civil rights action against police officers, did not involve the established public policy in favor of resolving employment disputes of public employees expeditiously as the case at hand does. Moreover, in *Garmon*, since the police officers did not raise it, the *Garmon* Court specifically reserved the question of whether a state statute, which required any person claiming damages against a municipality to commence the action within *six months*, should be applied. *Id.* 668 F.2d at 405 n.9.

The only other cases which in any way support the lower court's holding come from the Tenth Circuit, which has indicated, *in dicta*, that if a substantial question exists as to *which* state statute applies, it will apply the "more generous" limitation period as a matter of policy. *See e.g., Shah v. Halliburton*, 627 F.2d 1055, 1059 (10th Cir. 1980). However, the Tenth Circuit has recently disavowed that position. *Garcia v. University of Kansas*, 702 F.2d 849 (10th Cir. 1983).

In summary, the lower courts are clearly divided in this area; some applying administrative state limitations periods to analogous federal civil rights actions, many refusing to do so; most attempting to apply the most nearly analogous judicial limitations period whatever its length, but a few, the court below among them refusing even to do this. Certiorari should be granted so that this important public policy question can be definitively resolved.

CONCLUSION

No one case could resolve all of the possible limitations issues that could arise in a federal court action under 42 U.S.C. §1983.[13] However, the issue of what limitations period is appropriate is a particularly acute and recurring one in the area of employee discrimination actions brought against states and other public employers. Because so many states have articulated a policy of prompt assertion and resolution of public employment disputes, and because so many are affected by the important questions raised herein, we urge that review be granted and this Court reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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[13] A much longer limitations period might be appropriate in civil rights actions based upon other kinds of constitutional violations. For example, Maryland once had an express three-year statute of limitations for violations of certain State constitutional provisions that protect against physical invasion of personal and liberty interests. *See* Md. Code (1972 Repl. Vol.), Art. 57, § 1.

APPENDIX A

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U.S. Constitution—

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV, § 1—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42, United States Code:

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1985. Conspiracy to interfere with civil rights

Preventing officer from performing duties

(1) If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit

juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

§ 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

§ 1988. Proceedings in vindication of civil rights; attorney's fees

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Con-

stitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

MARYLAND ANNOTATED CODE

COURTS & JUDICIAL PROCEEDINGS ARTICLE

§ 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Art. 49B ANNOTATED CODE OF MARYLAND

§ 9. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, state agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article. A complaint filed with the federal or with a local human relations commission within six months from the date of occurrence shall be deemed to have complied with the provisions of this section.

(b) Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged or is engaged in any discriminatory practice within the scope of this article, and after a preliminary investigation by the Commission's staff authorized by the chairman or vice-chairman it is satisfied that said information warrants the filing of a complaint, the Commission, on its own motion, and by action of not less than three commissioners, may issue a complaint in its name in the same manner as if the complaint had been filed by an individual.

(c) The Commission shall meet at least once each month. In addition, the chairman or a majority of the Commission shall have the right at any time to call special meetings of the Commission upon five (5) days notice to the members thereof. The Commission shall establish procedures for the conduct of said meetings.

§10. Investigation; findings; agreement for elimination of discrimination; appeals.

(a) After the filing of any complaint the executive director shall consider the complaint and shall refer it to the Commission's staff for prompt investigation and ascertainment of the facts. The results of the investigation shall be made as written findings. A copy of the findings shall be furnished to the complainant and to the person, firm, association, partnership or corporation (hereinafter referred to as the "respondent"), against whom or which the complaint is made.

(b) If the finding is that there is probable cause for believing a discriminatory act has been or is being committed within the scope of any of these subtitles, the Commission's staff immediately shall endeavor to eliminate the discrimination by conference, conciliation, and persuasion, and shall forward a written copy of the findings of any investigation of a real estate agent or broker to the real estate commission.

(c) If an agreement is reached for the elimination of the discrimination as a result of the conference, conciliation and persuasion the agreement shall be reduced to writing and signed by the respondent, and an order shall be entered by the Commission setting forth the terms of the agreement. The Commission shall not enter an order at this stage of the proceedings unless it is based upon a written agreement. If no such agreement can be reached, a finding to that effect shall be made and reduced to writing with copies furnished to the complainant and to the respondent.

(d) A denial of the request for reconsideration of a finding of no probable cause by the Commission is a final order appealable to the circuit court as provided in § 255 of Article 41 of this Code provided that the United States Equal Employment Opportunity Commission does not have jurisdiction over the subject matter of the complaint.

§ 12. Enforcement of Commission's orders; complaint maliciously made; right to bring civil action not denied.

(a) If any respondent refuses to comply with an order of the Commission made within the scope of any of these subtitles, the Commission may, represented by its general counsel, institute litigation in the appropriate equity court of the county or in Baltimore City where the alleged discrimination took place to enforce compliance with any of the provisions of this article.

The court, in hearing said case shall be governed by the judicial review standards as set forth in the Administrative Procedures Act, §§ 255-256 of Article 41 of the Annotated Code of Maryland, except that additional evidence if otherwise admissible under the law of evidence, may be presented to the court without the necessity of an application or without the necessity of showing reasons for the failure to present it at the hearing before the Commission.

(b) Any person (including one acting for or on behalf of a firm, association, or corporation) is guilty of a misdemeanor if

(1) He has claimed to be aggrieved under the provisions of this subtitle; and

(2) He has pursued the complaint under §§ 14 and 15 [§§ 11 and 12] of this subtitle, or either of these sections; and

(3) The Commission has found the complaint to be unfounded or has dismissed it without further action against the respondent; and

(4) The court has found the complaint to have been made maliciously; and

Upon conviction thereof in the appropriate criminal court, he is subject to a fine of not more than five hundred dollars, or to imprisonment for a period not exceeding one year, or to both such fine and imprisonment in the discretion of the court.

This subsection shall not be construed or applied to deny the right of a respondent to bring any civil action against one who has filed a complaint under this subtitle.

Art. 64A, § 33 ANNOTATED CODE OF MARYLAND

§ 33. Separation of employees.

An employee may be permanently separated from the classified service through resignation, rejection on probation or removal, and may be temporarily separated through layoff, suspension or leave of absence.

The Secretary of Personnel shall by rule prescribe what shall constitute resignation.

The appointing authority may at any time before the expiration of the probation period reject any person appointed to a position in his department upon statement

in writing to the Secretary of Personnel of the cause for rejection; the probation period shall be for a period not exceeding 90 days, except for positions higher than the pay scale numbered 7 on January 1, 1967, in which positions the probation period shall be for a period not exceeding six months, unless the appointing authority shall suggest and the Secretary shall approve a longer period, which shall in no event under any circumstances, including changes of job classifications, exceed six months, except for positions higher than the pay scale numbered 12 on January 1, 1967, in which positions the period of probation shall not exceed one year, provided that no appointing authority shall have power to remove a probationer who has been appointed by promotion from another class without the consent of the Secretary. The employee so rejected shall be considered permanently separated from such position, but the Secretary may keep the name of the person thus rejected on the eligible list from which he was appointed for future certification to another position in the class to which the list applies.

No employee who has completed his probation may be permanently removed from the classified service except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges may be filed by the appointing authority or by any citizen, provided, however, that no such charges may be filed by a citizen, without the consent of the appointing authority or of the Secretary, and such charge shall within ninety days after filing, be heard, investigated and determined by the Secretary or by some person or board appointed by the Secretary to hear, investigate and determine the same. The Secretary of Personnel shall render this decision within 45 days after a hearing is held before him or his authorized representative or within 45 days after all legal memoranda or briefs have been filed.

The finding and decision of the Secretary or of such person or board when approved by the Secretary shall be final, and shall be certified to the appointing authority and shall be forthwith enforced by such authority.

The Secretary shall, by rule, prescribe what may constitute cause for removal, but no removal shall be allowed because of the religious or political opinions or affiliations of any employee. The provisions of this section shall apply to the demotion of an employee as described in §31 of this article.

Art. 64A, §52

STATE EMPLOYEE GRIEVANCE PROCEDURES

§52. Definitions.

(a) As used in this subtitle, the following words have the meanings indicated.

(b) *"Grievance"* means any cause of complaint unless otherwise provided for under this article arising between an employee and his employer over the interpretation and application of State employee personnel rules, regulations, policies or any other rules, regulations or policies over which management has control.

(c) *"Work day"* means any day from Monday through Friday. (1977, ch. 727.)

§53. Employees authorized to present grievances; representation; exceptions.

(a) Any employee classified or unclassified, of the executive branch of the State government, unless excepted by subsection (c) of this section, may present any grievance which he may have, in accordance with the provision of this subtitle, free from interference, coercion, restraint, discrimination or reprisal.

(b) Any employee authorized to present a grievance may be represented at any stage of the grievance procedure by any person or persons of his choice.

(c) The following persons are excepted from the provisions of this subtitle:

(1) Persons appointed by the Governor or whose appointment requires gubernatorial approval;

(2) Deputy Attorneys General and assistant Attorneys General, and all attorneys on the staff of the Attorney General including counsel to the principal departments of the executive branch of the State government;

(3) The chief deputy comptroller, and the chief deputy treasurer;

(4) Persons who are subject to collective bargaining agreements containing other grievance procedures;

(5) Persons who are subject to contracts, rules or regulations concerning teacher tenure, including employees on a faculty staff;

(6) Student employees;

(7) Patients and inmates in State institutions;

Art. 64A, §54 ANNOTATED CODE OF MARYLAND

STATE EMPLOYEE GRIEVANCE PROCEDURES

§54. Steps in procedure; back pay.

(a) *Steps outlined.* — There shall be five steps in this procedure.

(1) *Step one.* Step one shall be the initiation of a complaint. Grievances must be initiated within 30 days of the alleged complaint or within 30 days after the complaining employee reasonably may be held to have knowledge of the act of which he is complaining. An aggrieved employee and his designated representative may either:

(i) Present his grievance orally to his immediate supervisor for the purpose of informal discussions. If the grievance is unresolved after three days, the employee may appeal to stet two, which appeal must be in writing and filed within three days; or

(ii) Present his grievance in writing to his intermediate supervisor for formal consideration. If the grievance is presented to the intermediate supervisor, the intermediate supervisor shall within five days after receipt of the written grievance hold a conference with the aggrieved and or his designated representative and shall within five days after the conclusion of the conference render his decision in writing to the aggrieved and or his designated representative. In the event the aggrieved employee is not satisfied with the decision rendered at this step, he and or his designated representative may appeal in writing to step two within five days.

(2) *Step two.* The grievance appeal shall be presented, in writing, to the program director or his designated representative. Within five days after receipt of the written grievance, the program director or his designated representative shall hold a conference with the aggrieved and or his designated representative and shall render a written decision within ten days after the conclusion of the conference. In the event an aggrieved is not satisfied with the decision, he and/or his designated representative may appeal in writing to the next step within five days.

(3) *Step three.* The grievance appeal shall be presented, in writing, to the appointing authority, or his designated representative. Within ten days after the receipt of the written grievance appeal the appointing authority or his designated representative shall hold a conference with the aggrieved and/or his designated representative and shall render a written decision to the aggrieved within 15 days after the conclusion of the conference. In the event the aggrieved employee is not satisfied with the decision, he and/or his designated representative may appeal, in writing, to the next step within ten days.

(4) *Step four.* The grievance appeal shall be presented in writing to the Secretary of the Department or his designated representative. Within ten days after the receipt of the written grievance appeal the Secretary or his designated representative, shall hold a conference with

the aggrieved and/or his designated representative and shall render a written decision to the aggrieved within 15 days after the conclusion of the conference.

(5) *Step five.* If the dispute is still unresolved, the grieving employee shall have the right to submit said dispute to either arbitration or to the Secretary of Personnel. In either case the appeal must be submitted within 15 days after the receipt of the written decision at step four. If the grieving employee chooses to have his grievance heard by the Secretary of Personnel, the Secretary shall render his written decision within 45 days after the hearing is held by him or his authorized representative or within 45 days after all legal memoranda or briefs have been filed in the grievance hearing. In the event of arbitration, the parties shall select an arbitrator by mutual agreement. If they are unable to reach a mutual agreement, an arbitrator shall be supplied by the American Arbitration Association in accordance with its procedures. Any fees resulting from arbitration shall be assessed by the arbitrator equally between the two parties. The decision of the arbitrator shall be advisory to the Secretary of Personnel and no additional appeals or hearings may be considered. The Secretary of Personnel shall make the final decision which shall be binding on all parties. The written decision of the Secretary shall be rendered within 15 days after the receipt of the decision of the arbitrator.

(b) *Back pay based on grievances.* — The Secretary of Personnel shall have the power to order an appointing authority to grant back pay in any grievance and an appointing authority shall enforce any such order.

(c) *Back pay based on misclassification.* — In any reclassification case in which the Secretary of Personnel or his authorized representative determines that an employee is entitled to back pay because the employee has been misclassified or has been working out of classification, the Secretary may, in his discretion, award back pay to the employee for a period not to exceed one year prior to the initial filing of the grievance.

Human Relations Commission — State Employees

FOR the purpose of eliminating the necessity that State employees file a grievance, where one is available, in order to give notice of an employment discrimination complaint filed with the Human Relations Commission.

BY repealing and reenacting, with amendments,

Article 49B — Human Relations Commission
Section 7(b)
Annotated Code of Maryland
(1979 Replacement Volume and 1982 Supplement)

SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND, That the Laws of Maryland read as follows:

Article 49B — Human Relations Commission

7.

(b) (1) In any employment discrimination case in which an agency, officer or employee of the State of Maryland is a respondent, the rules, procedures, powers, rights, and remedies which are applicable in such a case shall be those which are applicable in a discrimination case in which a private person is the respondent[; provided that a State employee making a complaint to the commission concerning his State employment must first give notice by filing a grievance proceeding, if one is available to him].

(2) In discrimination cases in which an agency, officer or employee is a respondent, the power of the Human Relations Commission includes the authority to seek injunctive relief or judicial enforcement of its orders against such respondents.

SECTION 2. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 1983.

Approved May 24, 1983.

CODE OF MARYLAND REGULATIONS

06.01.01.60

.60 Appeal of Termination of Employment of An Unclassified Employee.

A. Notwithstanding the provisions of Regulation .01, an unclassified employee, except for unclassified and faculty employees of educational institutions, unless otherwise provided by law, whose employment is terminated according to Regulation .62 may submit a written appeal to the Secretary within 5 working days after receipt of the notice of termination.The appeal is limited to the legal and constitutional bases for the termination.

B. The Secretary or his designated representative shall hear the appeal within 30 calendar days after receipt of the written appeal. The Secretary shall render his written decision within 30 calendar days after the hearing. If the employee does not appeal the termination within the 5-day period set forth in § A, or if the employee does not appear at the scheduled hearing, the Secretary shall uphold the termination.

MARYLAND RULES OF PROCEDURE

Rule B4. Time for Filing.

a. *Within Thirty Days.*

An order for appeal shall be filed within thirty days from the date of the action appealed from, except that the agency is by law required to send notice of its action to any person, such order for appeal shall be filed within thirty days from the date such notice is sent, or where by law notice of the action of such agency is required to be received by any person, such order for appeal shall be filed within thirty days from the date of the receipt of such notice.

APPENDIX B

OPINIONS AND ORDERS

United States Court of Appeals
For The Fourth Circuit

No. 82-1924

James R. Grattan and Adrienne S. Hedman,
Appellants,

v.

Calvin W. Burnett, Individually and in his official capacity as President, Coppin State College; J. Carson Dowell, Individually; Board of Trustees of the State Universities and Colleges of Maryland; Edmund C. Mester, Individually; Ronald K. DeSouza, Individually and in his official capacity as Vice-President of Student Affairs, Coppin State College and Harry Hughes, Governor of Maryland,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Norman P. Ramsey, District Judge.

Argued March 10, 1983 *Decided June 22, 1983*

Before WINTER, Chief Judge, ERVIN, Circuit Judge, and ALDRICH,* Senior Circuit Judge.

*** Honorable Bailey Aldrich, Senior United States Circuit Judge for the First Circuit, sitting by designation.**

Sheldon H. Laskin (Glen M. Fallin on brief) for Appellants; Diana G. Motz, Robert A. Zarnoch (Christine Steiner, Michael A. Anselmi, Assistant Attorneys General; Stephen H. Sachs, Attorney General of Maryland on brief) for Appellees.

WINTER, Chief Judge:

James Grattan and Adrienne Hedman appeal from an order of the district court dismissing their complaints of race and sex discrimination brought under 42 U.S.C. §§ 1981, 1983, 1985 and 1986, and Article 23 of the Maryland Declaration of Rights. The suit was brought against the president of Coppin State College, a public institution of higher education operated by the State of Maryland, the vice-president of student affairs and the chairman and executive director of the board of trustees governing Coppin and other state universities and colleges. The district court held plaintiffs' claims time-barred since they were not brought within the six-month limitations period prescribed by Md. Ann. Code, Article 49B, § 9(a). We reverse. We conclude that the appropriate limitations period for such claims is three years, as prescribed by Md. Ann. Code, Courts and Judicial Proceedings, § 5-101. We conclude further that the claims may be deemed to have been brought within this period, even though they were not explicitly made by amended complaint until five years after the alleged discrimination, since the amended complaint relates back to an earlier and timely complaint.

I.

In the summer of 1976, James R. Grattan and Adrienne S. Hedman were dismissed from their positions as Director of Minority Relations and Minority Relations Counselor, respectively, at Coppin State College. They allege that they were dismissed and discriminated against while at Coppin State College because of their race, and in retaliation for their vocal support of white students there. Plaintiffs allege that they are both white, and, while it is not specifically alleged, the parties concede that Coppin

State College was a formerly all-black educational institution and is today still a predominantly black school. Hedman also alleges that she was discriminated against because of her sex.

Plaintiffs filed two claims of race and sex discrimination with the Equal Employment Opportunity Commission (EEOC) immediately upon learning of their pending termination in June 1976. While those claims were pending, they filed this suit in state court on February 17, 1977. They alleged that their dismissals were arbitrary, capricious, without basis in fact or law, illegal and invalid under the Maryland and Federal constitutions. However, their complaint contained no specific allegations of race or sex discrimination. Those claims, together with an allegation of violation of their right to free speech, were added on October 13, 1981, by the filing of an amended complaint. Defendants removed the state court action to the district court on November 12, 1981. At the time, there was pending in the district court two separate actions filed by Grattan and Hedman inn 1981 against the same defendants claiming unlawful employment discrimination under Title VII.

On motion of the defendants, the district court dismissed the removed action. However, it denied a motion to dismiss the complaints grounded on Title VII as being outside the scope of plaintiffs' EEOC charges. These actions are still pending. The district court ruled that plaintiffs' race and sex discrimination claims brought under 42. U.S.C. §§1981, 1983 and 1985 were barred since they were not brought within the six-month period of limitations provided in Md. Ann. Code, Article 49B, §9(a). Plaintiffs' §1986 action (failure to redress wrongs proscribed by §1985 by one who has knowledge and power to act) was also dismissed, even though it was brought within the one-year limitations period provided by that section, on the ground that it was derivative of the barred §1985 action. The district court ruled further that plaintiffs' free speech claim was governed by a three-year limitations period, but held it barred as well since it was

not raised until 1981 and did not relate back to the 1977 complaint. Finally, it dismissed their claim under the Maryland Constitution holding that it was doubtful that there was an implied cause of action for damages under Maryland law and, in the alternative, that the claim was barred under the six-month limitations period applicable to the analogous federal right.

Before us, neither party contests the propriety of the district court's disposition of the Title VII and free speech claims. The issues raised concern only the dismissal of plaintiffs' claims of race and sex discrimination brought under 42 U.S.C. §§1981, 1983, 1985 and 1986, and the Maryland Constitution.

II.

Sections 1981, 1983 and 1985 of Title 42 specify no limitations period for actions brought thereunder. We therefore look to Maryland law to borrow the limitations period for the most analogous state action. Recently, we rejected the argument that the appropriate limitations period for employment discrimination actions in Maryland is the six-month period prescribed in Md. Ann. Code, Article 49B, §9(a). That statute empowers the State Human Relations Commission to investigate and prosecute claims of employment discrimination, and requires that claims be filed within six months of the date of the occurrence. We held that the proper period in Maryland for actions under Title 42 is three years as provided by Md. Ann. Code, Courts and Judicial Proceedings, §5-501. That statute provides a general limitations period of three years for actions for which no other period is specifically provided. McNutt v. Duke Precision Dental and Orthodontic Laboratories, 698 F.2d 676 (4 Cir. 1983).

Despite *McNutt*, defendants urge upon us an even shorter limitations period — five and one-half months — derived from a variety of provisions in Md. Ann. Code, Article 64A, §33, regulations adopted thereunder, related statutes, and Rules of the Maryland Court of Appeals.

Article 64A establishes a merit system and employment protection for certain state employees and, by a combination of provisions, gives a discharged employee a total of five and one-half months to sue in a state court to redress an improper discharge. Of course, the effect of Article 64A was not considered in *McNutt* since the plaintiff there was a non-public employee, but we think that the reasoning of *McNutt* is equally applicable to public employees.

In *McNutt* we rejected the six-month limitations period of Article 49B, §9(a), because it governed the limitation of administrative proceedings which were informal, investigatory and conciliatory in nature. We reasoned that while such a short period might suffice to present an informal complaint which could then be fleshed out by the Commission, it was an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court, and that for this reason it was unlikely the Maryland legislature intended that this limitations period apply to civil actions. 698 F.2d at 678-679. We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in *McNutt*. A proceeding under Article 64A is an administrative proceeding and the largest part of it — 130 of the total of 165 days — is spent formally adjudicating a claim initiated by the state. That the Maryland legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof hardly evidences an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code. Article 49B, §7(b)(1). This, too, indicates that the Mary-

land legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination. Thus, we conclude that, in Maryland, three years is the limitations period for discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment.

III.

Next, we must determine whether the claims of race and sex discrimination first explicitly raised by Grattan and Hedman in their 1981 amended complaint relate back to the 1977 complaint, and so come within the three-year limitations period. Rule 15(c), F. R. Civ. P., states: "(w)henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." In applying Rule 15(c) in the past, we have focused upon two issues in determining whether an amended claim relates back to an earlier complaint. First, to relate back there must be a factual nexus between the amendment and the original complaint. *See, e.g.*, Griggs v. Farmer, 430 F.2d 638 (4th Cir. 1970), *aff'g per curiam* 314 F. Supp. 1185 (E.D. Va. 1969); Wall v. Chesapeake & O. Ry., 339 F.2d 434 (4th Cir. 1964). Second, if there is some factual nexus an amended claim is liberally construed to relate back to the original complaint if the defendant had notice of the claim and will not be prejudiced by the amendment. Davis v. Piper Aircraft Corp., 615 F.2d 606 (4th Cir.), *cert. dis.*, 448 U.S. 911 (1980).

There is a factual nexus between the discrimination claims which Grattan and Hedman added by amendment in 1981 and their complaint of arbitrary dismissal made in 1977. Both concern the events leading up to their termination at Coppin State College, and in both the termination was the ultimate wrong of which they complained.

It appears also that defendants had notice of the claims and will not be prejudiced by the amendment. Defendants

are the top administrators of Coppin State College. When Grattan and Hedman complained of race and sex discrimination in complaints filed with the EEOC in June 1976, defendants were bound to have known of them. Forewarned, they should have realized that, as this suit progressed, a discrimination theory might evolve. Moreover, because of the EEOC proceedings, it is more likely than not that they have preserved any evidence relevant to those claims. Thus, they should not be prejudiced by the amendment. Plainly, the Title VII proceedings should have put defendants on notice of the possibility that Grattan and Hedman might bring claims under the Civil Rights Act. *Cf.* Sessions, v. Rusk State Hospital, 648 F.2d 1066 (5th Cir. 1981); Gridley v. Cunningham, 550 F.2d 551 (8th Cir. 1977); Goss v. Revlon, Inc., 548 F.2d 405 (2nd Cir. 1976) *cert. den.*, 434 U.S. 968 (1977) (claims invoking Title VII and the Civil Rights Acts relate back to each other). For these reasons we conclude that the 1981 amendment did relate back and the claims asserted therein are not time-barred. The case must therefore be returned to the district court for further proceedings.*

REVERSED AND REMANDED.

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* We refrain from expressing any view on the question of whether plaintiffs have a private right of action under Article 23 of the Maryland Declaration of Rights. In the event that plaintiffs do not prevail on their federal rights of action and the district court concludes to exercise pendent jurisdiction, we think that the district court should certify this question to the Maryland Court of Appeals under Ann. Md. Code, Courts and Judicial Proceedings, § 12-601.

In The United States District Court
For The District Of Maryland

Memorandum and Order
Civil Action No. R-81-2407
(dated September 17, 1982)
Adrienne S. Hedman, Plaintiff

v.

Coppin State College; Board of Trustees of the State Universities and Colleges Of Maryland; And State Of Maryland, Defendants.

Civil Action No. R-81-2914

James R. Grattan and Adrienne S. Hedman, Plaintiffs

v.

Calvin W. Burnett, individually and in his official capacity as President, Coppin State College; J. Carson Dowell, individually; Board of Trustees of the State Universities And Colleges of Maryland; Edmund C. Mester, individually; Ronald K. DeSouza, individually and in his official capacity as Vice-President of Student Affairs, Coppin State College; and
Harry Hughes, Governor of Maryland, Defendants

Civil Action No. R-81-3176

James R. Grattan, Plaintiff

v.

Coppin State College and Board of Trustees of the State Universities and Colleges of Maryland and State of Maryland, Defendants

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These related cases involving claims of employment discrimination are currently before the Court on defendants' motions to dismiss. The motions have been fully briefed and counsel heard on the record. At the hearing, counsel indicated to the Court that certain agreements had been entered into which would clarify

several of the issues in the motions. In a letter dated May 19, 1982, from counsel for defendants the agreements of counsel were outlined for the Court.

In *Hedman v. Coppin State College,* R-81-2407, and *Grattan v. Coppin State College,* R-81-3176, plaintiffs Adrienne S. Hedman ("Hedman") and James R. Grattan ("Grattan"), respectively, have asserted causes of action for alleged employment discrimination in violation of Title VII 42 U.S.C. §2000e *et seq.* In *Grattan v. Burnett,* R-81-2914, Grattan and Hedman are joined as co-plaintiffs in a suit against various college officials alleging causes of action pursuant to 42 U.S.C. §§1981, 1983, 1985, and 1986; the First and Fourteenth Amendments; and Articles 19, 23, and 46 of the Maryland Constitution. Since the Title VII cases, R-81-2407 and R-81-3176, raise common issus, they will be addressed together and independently of R-81-2914.

I. *The Motions To Dismiss Plaintiffs' Title VII Claims*

On September 22, 1981, Hedman, a former unclassified administrative employee at Coppin State College ("Coppin"), filed Civil Action No. R-81-2407 against Coppin, the Board of Trustees of the State Universities and Colleges of Maryland ("the Board") and the State of Maryland ("the State"). In her complaint, she alleges race and sex discrimination in a broad variety of areas including pay increases, job assignments and the non-renewal of her employment contract for the academic year 1976-77. Hedman seeks back pay, compensatory damages, reinstatement to her former position, and costs and attorneys fees, pursuant to Title VII.

On December 10, 1981, Grattan, a former unclassified administrative employee at Coppin filed Civil Action No. R-81-3176 against Coppin, the Board, and the State. In his complaint Grattan alleges race and sex discrimination in a broad variety of areas including compensation, terms, conditions, and privileges of employment. Like Hedman, Grattan seeks back pay, compensatory damages, reinstatement, and costs and attorney's fees.

Defendants moved to dismiss the Board and State arguing that they had not been named by either Hedman or Grattan in their respective charges to the EEOC. Subsequent to the filing of the motions, counsel for plaintiffs and defendants stipulated that the Board and the State should be dismissed, with the further stipulation that Coppin State College is an agency of the State of Maryland. Defendants' motion to dismiss the Board and the State in R-81-2407 and R-81-3176, therefore, will be granted and plaintiffs' Title VII suits will proceed against Coppin only.

Defendants have also moved to dismiss all allegations in Grattan's and Hedman's complaints which were not made in their charges to the EEOC. In Hedman's charge to the EEOc she claimed that her race (white) was the reason that her contract was not renewed for the 1976-77 year and that because of her sex (female) she had been paid at a lower rate than male employees performing the same duties with less seniority and fewer qualifications. In the complaint in this case, Hedman alleges race and sex discrimination not only in connection with pay and termination, but also in connection with (1) adverse treatment by supervisors, (2) unjustified transfers within the College, (3) discriminatory work assignments, (4) reassignment with the College, (5) payroll difficulties, and (6) difficulties in securing contracts.

In Grattan's charge to the EEOC, he claimed that because he was white, he was terminated whereas black employees who had been unable to perform their duties properly had not been discharged. In the complaint in this case Grattan alleges race and sex discrimination and discrimination pertaining to terms and conditions of employment such as denial of (1) conference attendance, (2) long distance telephone privileges, (3) administrative and logistical support, and (4) the cancellation of an athletic event.

It is well settled that "the scope of a Title VII suit is limited to the claims asserted in the administrative charge

of discrimination and such other claims uncovered during a reasonable administrative investigation of that charge, provided that those other claims were actually investigated by the administrative agency." *Mobley v. Acme Markets, Inc.*, 473 F. Supp. 851, 853 (D. Md. 1979). This requirement promotes the statutory preference for agency conciliation prior to a civil suit. To permit new claims would by-pass the conciliation procedures and frustrate the role of the EEOC in the statutory scheme. *Hubbard v. Rubber Maid, Inc.*, 436 F. Supp. 1184 (D. Md. 1977).

In response to the motions to dismiss, both Hedman and Grattan have amended their complaints to allege that all of the allegations contained therein were made to the EEOC and investigated by the EEOC. In addition, Hedman has provided the Court with a copy of her affidavit to the EEOC wherein she stated in detail not only her termination and equal pay claims, but also those claims in her complaint dealing with work assignments, transfer, and treatment. Viewing, as it must on a motion to dismiss, the well pleaded material allegations of the complaint in the light most favorable to plaintiffs, the Court must assume at this stage of these proceedings that Grattan's and Hedman's claims of discrimination were made to and/or investigated by the EEOC. Defendants' argument that plaintiffs have failed to substantiate their allegations that these claims *were actually investigatged* by the EEOC is misplaced on a motion to dismiss. The motions to dismiss portions of Hedman's and Grattan's claims as being outside the scope of their charges to and the investigations by the EEOC will be denied.[1]

Defendants have moved to dismiss any claims of alleged employment discrimination which occurred prior to 180 days before plaintiffs filed their charges of discrimination

[1] Grattan has noted, however, that any reference in his complaint to sex discrimination was inadvertent and is not part of his cause of action. Therefore, defendants' motion to dismiss Grattan's claims of discrimination on the basis of gender as being outside the scope of his charge to the EEOC will be granted.

with the EEOC. Since Hedman filed her charge with the EEOC on June 23, 1976, defendants argue that any cause of action relating to allegations of employment discrimination prior to December 26, 1975, should be dismissed as time barred. Grattan filed his charge with the EEOC on June 22, 1976, and defendants similarly argue that December 25, 1975, is the temporal time limit for defining his cause of action. In response to defendants' argument for a 180-day limitation, plaintiffs have raised three bases for a longer limitations period in their respective cases.

First, Hedman and Grattan each argue that their complaints allege a continuing pattern and practice of discrimination which tolls the running of the statute of limitations. Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e) establishes the time limitations for filing a charge of discrimination with the EEOC. These limitations for filing an EEOC charge are flexible, however, where a continuing violation of Title VII is present. *See Patterson v. American Tobacco Co.*, 586 F.2d 300, 304-05 (4th Cir. 1978), *after remand*, 634 F.2d 744, 751 (4th Cir. 1980), *vacated*, 71 L. Ed. 2d 748 (1982). Recently the Supreme Court has restricted the scope of the continuing violation doctrine. In *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 588 (1977), the Supreme Court expressly rejected a claim of continuing discrimination even though it was conceded that the plaintiff was suffering from present effects of past discrimination, holding that the emphasis should not be placed on mere continuity, but instead on whether any present violation exists. Similarly, in *Day v. Patapsco & Back Rivers Railroad Co.*, 504 F. Supp. 1301, 1304 (D. Md. 1981), the Honorable Joseph H. Young of this Court noted that "to construe too loosely 'continuing discrimination' would undermine the theory underlying the statute of limitations."

The typical illustration of a continuing violation is the payment of a discriminatory wage. *See, e.g., Kim v. Coppin State College*, 662 F.2d 1055, 1061 (4th Cir. 1981); *Corbin v. Pan American World Airways, Inc.*, 432 F. Supp. 939 (N.D. Cal. 1977). The payment of a discriminatory wage is

repeated each time the plaintiff receives a pay check. *Mobley v. Acme Markets, Inc., supra,* 473 F. Supp. at 858. "In contrast, demotions, layoffs, and discharges, are discrete acts not subject to repetition and are normally not considered to be continuing violations." *Id.* (citations omitted).

Hedman's principal claims are that she was discriminatorily terminated and paid an unequal wage. Grattan's primary claim is that he was discriminatorily terminated. Under any limitations, Hedman's and Grattan's termination claims are timely, each having filed a charge of discrimination with the EEOC well within 180 days of their termination. Further, as noted above, Hedman's equal pay claim is also timely as it clearly constitutes a continuing violation claim. Both plaintiffs, however, attempt in their complaints to reach back and make actionable all those incidents leading up to their terminations which they regard now as examples of unequal treatment. Hedman, for example, seeks to recover for alleged adverse treatment by a supervisor in 1972, subsequent reassignment within the college, payroll difficulties in 1973, and treatment by supervisors in 1975. Similarly, Grattan asserts as continuing violations the alleged denial of long distance telephone privileges, the denial of conference attendance, and cancellation of an athletic event. Counsel for plaintiffs concedes that the incidents recited above are facially discrete. He argues, however, that since these incidents are joined by racial animus, as illustrated by incidents of hostility, they support findings of continuing violations.

The Court finds that, with the exception of Hedman's claim for unequal pay, plaintiffs have not alleged claims which can be characterized as continuing violations. The allegedly discriminatory acts asserted in the complaints, such as termination, cancellation of a sporting event, work assignments, etc., are discrete and isolated acts and did not constitute *present violations* at the time charges were filed by plaintiffs with the EEOC. Acceptance of counsel

for plaintiffs' theory for finding a continuing violation in this case would mean that any time a plaintiff alleges discrimination on the basis of race, there would be a continuing violation and he, in some cases, could file his charge with the EEOC at any time without regard to the statutorily established period of limitations. It was precisely this type of analysis against which Judge Young warned in *Day v. Patapsco & Back Rivers Railroad Co., supra.*

As a practical matter, the Court notes that plaintiffs' cases are not prejudiced by the application of the statutory limitations period. As noted, their primary claims of termination and unequal pay are timely filed and are actionable. Since there can be only recovery if liability is established, it seems to matter little if, for example, Grattan had an independent cause of action for being denied attendance at a conference or long distance telephone privileges, and Hedman, for example, had an independent cause of action for discriminatory work assignments in 1972. As the Supreme Court noted in *United Air Lines, Inc. v. Evans, supra,* all these prior acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue." 431 U.S. at 558. Evidence about these prior acts will be admissible at trial and, when viewed together, may paint two pictures of discriminatory treatment which in each case ultimately resulted in termination. Thus, although the incidents occurring before the limitation period in each case are not independently actionable, they are relevant to the viable causes of action in these cases.

In addition to arguing that their claims are continuing in nature thereby tolling limitations, Hedman and Grattan both argue that limitations should be tolled in their cases since the running of the period for filing an administrative charge is subject to equitable tolling. Plaintiffs' rely on the Supreme Court's recent decision in *Zipes v. Trans World Airlines, Inc.,* 71 L. Ed. 2d 234 (1982), wherein the Court held that filing a timely charge

of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. Although plaintiffs' have accurately stated the law, they have not suggested any reason why limitations should be tolled on equitable grounds in their respective cases. There is no element of waiver in these cases since defendants have expressly raised limitations as a defense in their answers and motions to dismiss. Similarly, Hedman and Grattan have not claimed that defendants should be equitably estopped from raising limitations. *See Citicorp Person-to-Person Financial Corp. v. Brazell,* 658 F.2d 232, 234-35 (4th Cir. 1981). Their argument that by characterizing their claims as continuing violations they are entitled to the benefit of equitable tolling as outlined in *Zipes,* is based on an overly broad interpretation of that case.

Finally, plaintiffs argue that if a limitations period is to be applied in their cases, 300 days, rather than 180 days is the applicable period. Under Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), the EEOC charge is to be filed within 180 days of the alleged discriminatory act. If the charge must be filed with the state fair employment practices agency under 42 U.S.C § 2000e-5(c), the time for filing an EEOC charge is extended to 300 days. *Mohasco Corp. v. Silver,* 447 U.S. 807, 810 (1980). The State of Maryland has established a deferral agency — the Maryland Commission on Human Relations (MCHR) — with authority to provide relief from unlawful employment practices. Article 49B, § 9(a) of the Annotated Code of Maryland provides that to be timely, a charge must be filed with the MCHR within six months of the alleged discriminatory conduct. Neither Hedman nor Grattan claim to have filed charges with the MCHR within six months of the alleged discriminatory conduct. Charges of discrimination, however, in both cases were filed with the EEOC within 180 days of their terminations.[2]

[2] Defendants do not contest the timeliness of Hedman's termination and equal pay claims and Grattan's termination

In *Mobley v. Acme Markets, Inc., supra,* 473 F. Supp. at 857, the U.S. District Court for this District, relying on the Court of Appeals for the Fourth Circuit's decision in *Doski v. M. Goldseker Co.,* 539 F.2d 1326 (4th Cir. 1976), held that to trigger the longer, 300-day time limit for filing charges with the EEOC, state charges must be timely filed under state law. *Accord, Battle v. Clark Equipment, Brown Trailer Division,* 524 F. Supp. 683, 686 (N.D. Ind. 1981) (and the numerous cases cited therein).[3] The Supreme Court's subsequent decision in *Mohasco Corp. v. Silver, supra,* does not require a different result. In *Mohasco,* the Supreme Court noted that a claimant in a deferral state was not required to file a charge of discrimination with the state's deferral agency within 180 days to benefit from the 300-day period for filing a charge with the EEOC. In that case, however, the plaintiff filed timely charges with the New York deferral agency under that state's one year limitations period. Thus, *Mohasco* did not disturb the principal first stated in this district in *Mobley* that plaintiffs who fail to file timely charges with deferral state agencies cannot take advantages of Section 706(e)'s 300-day limitation.

Similarly, the Supreme Court's decision in *Oscar Mayer & Co v. Evans,* 441 U.S. 750 (1979), construing the Age Discrimination Employment Act (ADEA), also relied on by plaintiffs, does not require a contrary result. Although *Oscar Mayer* arguably lays the ground work for the result plaintiffs seek, the case does not address the issue of whether a charging party under Title VII or statutes modeled on Title VII must file a timely claim with the

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claim, the principal claims made in these lawsuits. As counsel for plaintiffs noted at the hearing, it is not critical in these cases whether 180 days or 300 days is the appropriate limitations, since plaintiffs' claims, in large part, are either well within 180 days of their filings or well beyond 300 days of their filings with the EEOC.

[3] For an outline of the division on this issue which has existed among the lower federal courts, see *Baruah v. Young,* 536 F. Supp. 356, 361-62 (D. Md. 1982).

State deferral agency to benefit from a longer limitations period for filing a charge with the federal agency. In view of the subsequent opinions from this district, *e.g., Mobley v. Acme Markets, Inc., supra,* Fourth Circuit decisions, *see Citicorp Person-to-Person Financial Corp. v. Brazell, supra,* (although Title VII and the ADEA are to be construed similarly, the filing requirements of each are not identical), and the absence of a definitive statement from the Supreme Court, the Court finds that the current law in this Circuit requires a plaintiff to file a timely charge with the state deferral agency to be entitled to a 300-day time limit for filing with the EEOC. The Court concludes, therefore, that it will consider as actionable only those acts or omissions occurring within the 180-day period before plaintiffs charges were filed with the EEOC. As to Hedman, relief pursuant to Title VII for any alleged unlawful acts occurring prior to December 26, 1975, is time barred and similar relief for Grattan is time barred for alleged unlawful acts occurring prior to December 25, 1975.

Defendants have also moved to strike Hedman's and Grattan's claims for compensatory damages under Title VII. In response to the motions, Hedman and Grattan have abandoned their claims for compensatory damages in their Title VII suits. Therefore, defendants' motions to strike Hedman's claim for compensatory damages in R-81-2407 and Grattan's claim for compensatory damages in R-81-3176, will be granted.

II. *The Motion To Dismiss Plaintiffs' Claims Arising Under The Civil Rights Act And The United States And Maryland Constitutions*

On February 17, 1977, Hedman and Grattan filed what is now known as R-81-2914, in the Circuit Court No. 2 of Baltimore City, against Calvin W. Burnett ("Burnett"), President of Coppin; J. Carson Dowell ("Dowell"), then the Chairman of the Board; Edmund C. Mester ("Mester"), then the Executive Director of the Board; Ronald K. DeSouza ("DeSouza"), Vice President for Student Affairs

at Coppin; and Marvin Mandel, then Governor of Maryland. The suit was premised on the Maryland Uniform Declaratory Judgment Act and sought a declaration that the non-renewal of plaintiffs' employment contracts in the summer of 1976 had been arbitrary, capricious, without basis in fact or law, illegal, and invalid under the Constitutions of the United States and the State of Maryland.

In March, 1977, defendants demurred to the Bill of Complaint on the grounds of sovereign immunity and in December, 1978, they filed a supplemental demurrer on the ground that the facts set forth in the complaint did not state a case appropriate for declaratory relief. On September 9, 1981, a hearing on defendants' demurrers was held before Judge Joseph H. Kaplan of the Supreme Bench of Baltimore City and, without consideration of the original demurrer, defendants' supplemental demurrer was granted with leave to amend on September 10, 1981. On October 13, 1981, plaintiffs filed an amended and supplemental bill of complaint. The amended complaint altered the jurisdictional basis for and legal theories underlying the action. In Count I of the amended complaint, Hedman and Grattan assert a cause of action under 42 U.S.C. §§1981, 1983, 1985 and 1986, the Fourteenth Amendment, and Article 23 of the Declaration of Rights of the Constitution of Maryland, alleging that they were dismissed from their employment on the basis of race. In Count II, Hedman alleges a cause of action for employment discrimination based on sex under 42 U.S.C. §1983, the Fourteenth Amendment, and Articles 23 and 46 of the Maryland Constitution. Claims for violations of the right to free speech are asserted by Grattan and Hedman in Counts III and IV respectively under the First and Fourteenth Amendments of the United States Constitution, Article 19 of the Maryland Constitution and 42 U.S.C. §1983. Count V of the amended complaint is a claim by Grattan for relief from alleged employment discrimination under Title VII, 42 U.S.C. §2000e *et seq.*

In response to the amended complaint, defendants, noting that the allegations sounded in law rather than in equity, filed a motion to transfer the action to the Superior Court for Baltimore City, pursuant to Rule 515 of the Maryland Rules of Procedure. This transfer was effected on November 5, 1981, and, on November 12, 1981, defendants filed a petition removing the action to this Court. The motion to dismiss currently before the Court was subsequently filed.

Defendants have moved to dismiss plaintiffs' claims of employment discrimination in Counts I and II of the amended complaint as untimely filed. Sections 1981, 1983 and 1985 contain no facial limitations provisions.[4] The relevant statute of limitations for federally created causes of action which do not provide their own filing periods is the state statute or remedy "most analogous" to the federal action. *Burns v. Sullivan*, 619 F.2d 99, 105 (1st Cir.), *cert. denied*, 499 U.S. 893 (1980); *see Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975); *McCausland v. Mason County Board of Education*, 649 F.2d 278, 279 (4th Cir.), *cert. denied*, 70 L. Ed. 2d 639 (1981). The Court of Appeals for the Fourth Circuit has established a more comprehensive standard for determining which state statute of limitations should be applied to an action brought under a federal law that has none:

> When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted. It is not necessary that a state statute operate in the same fashion as the federal scheme, nor is it necessary that the state

[4] Plaintiffs' claims under 42 U.S.C. § 1983 and 1985 are based on an alleged denial of equal protection guaranteed by the Fourteenth Amendment. Plaintiffs' state in their memoranda that they are not pursuing claims under the due process clause of the Fourteenth Amendment, despite language in the original complaint to the contrary.

> statute describe a cause of action identical to the federal cause at issue. There simply must be a commonality of purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law.

O'Hara v. Kovens, 625 F.2d 15, 18 (4th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981) (citations omitted).

In *McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981), *appeal docketed*, the Honorable Joseph H. Young of this Court held that under the *O'Hara* standard the six-month limitations period contained in Md. Ann. Code Art. 49B, § 9(a), is the "most analogous" limitations period for employment discrimination suits in Maryland brought under Section 1981. Although Judge Young's holding in *McGill* has not been universally accepted by all the members of this Court, *see Evans v. Chesapeake & Potomac Telephone Co.*, 535 F. Supp. 499 (D. Md. 1982) (Miller, J.) (applying a three-year limitations period to employment discrimination claims brought under Section 1981); *Wilson v. Milke*, Civil Action No. HM-80-2214 (D. Md. March 17, 1982) (Murray, J.) (oral opinion) (applying a three-year period of limitations to an employment discrimination claim brought under Section 1981), it currently is the accepted view of the writer, *see McKee v. SCM, Corp.*, Civil Action No. R-79-162 (D. Md. January 29, 1982), and at least one other judge of this Court, *see Brice v. Crown Cork & Seal Co.*, Civil Action No. H-78-1207 (D. Md. January 15, 1982) (Harvey, J.) (oral opinion).

The last discriminatory act complained of by Hedman and Grattan, their termination, became effective July 31, 1976. They had been notified of their termination in June, 1976.[5] No claims based on their terminations or any other

[5] It would appear that limitations commenced on plaintiffs' termination claims in June, 1976, at the time the employment decision was made and communicated to them. *See Delaware*

incidents which now are claimed to have been discriminatory, were raised until February 17, 1977, more than six months after the fact. Claims specifically based on Sections 1981, 1983, and 1985, were not raised until October 13, 1981. Even assuming that these amended claims "relate back" to the time of the original filing of the bill of complaint, they are time barred under the applicable six month limitations period. Furthermore, even if the Court were to construe the claims as continuing in nature, which for the reasons previously stated, it does not, limitations would still be a bar since the last act complained of, termination, occurred more than six months prior to the filing of their lawsuits. The Court holds, therefore, that plaintiffs' claims for employment discrimination arising in Maryland under Sections 1981, 1983 and 1985 are barred by limitation.

As to plaintiffs' claims arising under Section 1986 in Count I, the one year limitations period prescribed by that statute governs. However, inasmuch as Section 1986 is derivative of Section 1985, where a party has failed to state a timely claim under Section 1985, there is no ground for relief under Section 1986. *See Schoonfield v. Mayor and City Council of Baltimore*, 399 F. Supp. 1068, 1087 (D. Md.) (and the numerous cases cited therein), *aff'd*, 544 F.2d 515 (4th Cir. 1975). Since plaintiffs' claims of employment discrimination arising under Section 1985 are time barred, the motion to dismiss their claims arising under Section 1986 will be granted.

As to plaintiffs' claims of employment discrimination in Counts I and II arising directly under the Maryland Constitution, the Court notes that there currently exists no authority for a cause of action for damages for violation of state constitutional rights. *See generally* Rees, *State Constitutional Law for Maryland Lawyers: Judicial Relief*

State College v. Ricks, 449 U.S. 250, 258-62 (1980). Even if the last date of employment, July 31, 1976, is the date limitations commenced, plaintiffs' claims would still be barred under a six month limitations period.

for Violations of Rights, 10 U. Balt. L. Rev. 102, 122 (1980). Even if such a cause of action could be said to exist, however, the applicable limitations logically should be the same as that controlling the federal right. *See Davidson v. Koerber,* 454 F. Supp. 1256 (D. Md. 1978) (cause of action under Article 23 of Maryland Declaration of Rights analogous to cause of action under 42 U.S.C. § 1983).

In Count III of the amended complaint Grattan asserts that he was discharged for advocating and supporting the establishment or foundation at Coppin of a "white students union." In Count IV of the amended complaint, Hedman asserts that she was discharged because she expressed opposition to a policy at Coppin which prevented certain transfer students from graduating "with honors". In Counts III and IV plaintiffs' allege that their discharge violated their First and Fourteenth Admendment rights and their rights secured by Article 19 of the Declaration of Rights of the Constitution of Maryland. The federal constitutional claims are brought pursuant to Section 1983.

Unlike the plaintiffs' claims for employment discrimination contained in Counts I and II of the amended complaint; their free speech claims in Counts III and IV are not controlled by a six month limitations period. Although the alleged First Amendment violations may have arisen in the same setting as plaintiffs' employment discrimination claims, this fact does not operate to divest plaintiffs of any other claims they might have. *Hall v. Board of County Commissioners of Frederick County,* 509 F. Supp. 841, 848 (D. Md. 1981); *see Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 459-60 (1975). Thus, as to these free speech claims, Art. 49B, § 9(a) of the Md. Ann. Code is not the most analogous limitations period and instead Maryland's general three year statute of limitations applies to plaintiffs' Section 1983 claims and state constitutional claims in Counts III and IV. *Hall v. Board of County Commissioners of Frederick County, supra.*

Plaintiffs' amended complaint, alleging for the first time free speech claims arising prior to July 31, 1976 (the date plaintiffs were terminated) was filed on October 13, 1981. As previously noted, the original complaint was filed on February 17, 1977. It is apparent, therefore, that plaintiffs' First Amendment claims, even under a three year period of limitations, are timely only if they related back to the filing of the original complaint.

Rule 15(c) of the Federal Rules of Civil Procedure provides in relevant part:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

This rule "is based on the idea that a party who is notified of litigation concerning a given transaction or occurrence is entitled to no more protection from statutes of limitations than one who is informed of the precise legal description of the rights sought to be enforced." 3 *Moore's Federal Practice* § 15.15[2].

The critical element in determining whether the claim relates back under Rule 15(c), is whether the original complaint gave the defendants notice of the range of matters sought to be added by the amended complaint. *Wassel v. Eglowsky,* 399 F. Supp. 1330, 1359 (D. Md. 1975), *aff'd per curim,* 542 F.2d 1235 (4th Cir. 1976); *Schoonfield v. Mayor and City Council of Baltimore, supra,* 399 F. Supp. at 1090; *Goodman v. Poland,* 395 F. Supp. 660, 684 (D. Md. 1975). Amendments that do no more than restate the original claim with greater particularity or amplify the details of the transaction alleged in the original complaint fall with in Rule 15(c). If, however, the alteration of the original statement is so substantial that it cannot be said that defendants were given adequate notice of the conduct, transaction, or occurrence that formed the basis of the claim, then the amendment will not relate back and will be time barred if the limitations

period has expired. 6 Wright & Miller, *Federal Practice & Procedure* § 1497 at pp. 491-92.

In the instant case, the Court finds that the original complaint filed by plaintiffs on February 17, 1977, did not put defendants on notice of plaintiffs' free speech claims which were added in Counts III and IV of the amended complaint filed on October 13, 1981. In the original complaint plaintiffs' alleged that they were illegally terminated because of untrue claims by defendants' that they had performed their duties in recruitment of "other race" students poorly. Although the complaint did not allege discrimination on the basis of either race or sex, under a broad interpretation of the notice provision it is arguable that defendants had notice of race and sex discrimination claims from plaintiffs' charges of discrimination which had been filed with the EEOC in August of 1976, prior to the filing of their complaint. As plaintiffs concede in their memorandum, however, their free speech claims were raised in neither the original complaint nor their Title VII charges of discrimination filed with the EEOC. It was only in October of 1981, over five years after the incidents in question, that plaintiffs stated claims under the First Amendment and alleged a factual basis for these claims. In view of all the circumstances, the Court finds that although governed by a three year prior of limitations, plaintiffs' free speech claims in Counts III and IV of the amended complaint do not relate back to the filing of the original complaint and, therefore, are barred by limitations and should be dismissed.

In Count V of the amended complaint, Grattan asserts a cause of action pursuant to Title VII. Grattan, however, has filed his Title VII claim in an independent lawsuit, R-81-3176, and, therefore, requests that Count V of the amended complaint in R-81-2914 be stricken. The motion to dismiss Count V of the amended complaint, therefore, will be granted.

For the reasons stated herein, it is this 17th day of September, 1982 by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motions to dismiss the Board of Trustees of the State Universities and Colleges of Maryland and the State of Maryland in R-81-2407 and R-81-3176, are GRANTED;

2. That defendants' motions to dismiss portions of the complaints in R-81-2407 and R-81-3176 as outside the scope of plaintiffs' charges to the EEOC are DENIED;

3. That defendants' motion to dismiss plaintiff Grattan's claims of sex discrimination in R-81-3176 is GRANTED;

4. That defendants' motions to dismiss plaintiff Hedman's claims in R-81-2407 arising before December 26, 1975, except for claims of unequal pay, is GRANTED;

5. That defendants' motion to dismiss plaintiff Grattan's claims in R-81-3176 arising before December 25, 1975, is GRANTED;

6. That defendants' motions to dismiss plaintiffs Hedman's and Grattan's claims for compensatory damages in R-81-2407 and R-81-3176, respectively are GRANTED;

7. That defendants' motion to dismiss the amended complaint in R-81-2914 is GRANTED; and

8. That the Clerk shall mail copies of this Memorandum and Order to all Counsel of record.

NORMAN P. RAMSEY,
United States District Judge

In The United States District Court
For The District of Maryland

Civil Action No. R-81-2914

James R. Grattan and Adrienne S. Hedman,
Plaintiffs,

v.

Calvin W. Burnett, Individually and in his official capacity as President, Coppin State College; J. Carson Dowell, Individually; Board of Trustees of the State Universities and Colleges of Maryland; Edmund C. Mester, Individually; Ronald K. DeSouza, Individually and in his official capacity as Vice-President of Student Affairs, Coppin State College and Harry Hughes, Governor of Maryland,

Defendants.

JUDGMENT
(dated September 17, 1982)

In accordance with the Memorandum and Order dated the 17th day of September, 1982, and filed in the above entitled case, it is

ORDERED and ADJUDGED:

That judgment is hereby entered in favor of the defendants and against the plaintiffs.

Norman P. Ramsey,
United States District Judge.

Office - Supreme Court, U.S.
FILED
JAN 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT, ET AL.,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOINT APPENDIX

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Petition for Certiorari filed August 17, 1983
Certiorari Granted November 14, 1983

THE DAILY RECORD COMPANY, BALTIMORE, MARYLAND 21202

TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	1
What May Be Found in the Appendix to the Petition for a Writ of Certiorari	4
Bill of Complaint for Declaratory Judgment and Other Relief	5
Amended and Supplemental Bill of Complaint	11
Defendants' Motion to Dismiss and Exhibits 2 and 3	33
Supplement to Defendants' Motion to Dismiss	39
Opposition to Supplement to Defendants' Motion to Dismiss	40

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RELEVANT DOCKET ENTRIES

Date		Proceedings
1981	November 12	Petition for Removal
1981	November 12	Bond for Removal
1981	November 12	Notice of Removal
1981	November 12	Complaint
1981	November 12	Defendants' Demurrer
1981	November 12	Defendants' Supplemental Demurrer
1981	November 12	Motion of Plaintiffs to Suspend Maryland Rule 530

1981	November 12	Request of Plaintiffs for Hearing on Defendants' Demurrer
1981	November 12	Amended and Supplemental Bill of Complaint
1981	November 12	Motion of Defendants for Transfer of Action Pursuant to Rule 515
1981	November 12	Response of Plaintiffs to Motion of Defendants to Transfer Action
1981	November 12	Order (Greenfeld, J.) dated November 5, 1981, transferring action to the Superior Court for Baltimore City
1981	November 12	Equity Summons filed in the Circuit Court No. 2 of Baltimore City
1981	November 30	Motion of Defendants to Dismiss, Memorandum and Exhibits 1 through 4
1981	December 23	Stipulation and Order (Ramsey, J.) extending the time within which Plaintiffs may file opposition to Motion of Defendants to Dismiss, to and including January 15, 1982
1982	January 21	Opposition of Plaintiffs to Motion of Defendants to Dismiss, Memorandum and Request for Hearing
1982	January 22	Stipulation and Order (Northrop, SJ) extending the time within which Plaintiffs may file opposition to Motion of Defendants to Dismiss, to and including January 20, 1982
1982	January 29	Stipulation and Order (Ramsey, J.) extending the time within which Defendants may file a response to Opposition of Plaintiffs to their

		Motion to Dismiss, to and including February 19, 1982.
1982	February 2	Stipulation and Order (Ramsey, J.) extending the time within which Plaintiffs may file a response to Motion of Defendants to Dismiss, to and including January 20, 1982. Dated: February 1, 1982
1982	February 19	Reply Memorandum of Defendants to Opposition of Plaintiffs to its Motion to Dismiss
1982	March 2	Supplemental Motion of Defendants to Dismiss, Memorandum and Exhibits A & B
1982	March 30	Stipulation and Order (Ramsey J.) dated March 29, 1982 extending time within which Plaintiffs may respond to Supplemental Motion of Defendants to Dismiss, to and including April 1, 1982
1982	April 6	Opposition of Plaintiffs to Supplemental Motion of Defendants to Dismiss and Memorandum
1982	April 29	Hearing on Motion of Defendant to Dismiss held before Ramsey, J.
1982	April 29	Argued. Held sub-curia.
1982	September 29	Memorandum and Order (Ramsey, J.) dated 9-17-82, "Granting" Motions of Defendants Board of Trustees of State of Maryland and Colleges of Maryland and State of Maryland to Dismiss in Civil Action Numbers R81-2407 and R81-3176; "Denying" Motions of Defendants to Dismiss portions of the Complaint in R81-2407 and

		R81-3176 as set forth; "Granting" Motion of Defendants to Dismiss Claim of Plaintiff Grattan of Sex Discrimination in R81-3176; "Granting" Motions of Defendants to Dismiss Claims of Plaintiff Hedman in R81-2407 and R81-3176; "Granting" Motion of Defendants to Dismiss Claims of Plaintiff Hedman and Grattan for Compensatory Damages in R81-2407 and R81-3176; "Granting" Motion of Defendants to Dismiss the Amended Complaint in R81-2914.
1982	September 29	Judgment (Ramsey, J.) dated 9-17-82, entered in favor of Defendants and against Plaintiffs
1982	October 13	Notice of Appeal of Plaintiffs
1983	March 10	Argued and Held sub-curia in United States Court of Appeals for the Fourth Circuit
1983	June 22	Opinion of United States Court of Appeals for the Fourth Circuit reversing judgment of the District Court of Maryland
1983	August 17	Petition for a Writ of Certiorari
1983	November 14	Certiorari Granted

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. Opinion of the United States Court of Appeals for the Fourth Circuit filed June 22, 1983 ..... App. 16

2. Opinion of the United States District Court for the District of Maryland dated September 17, 1982 App. 23

(Title Omitted)

BILL OF COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

(Filed February 17, 1977)

To The Honorable, The Judge of Said Court:

NOW come the Plaintiffs, James R. Grattan and Adrienne S. Hedman, by their attorney, William O. Goldstein, and respectfully represents the following:

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to Title Three, Courts and Judicial Proceedings, sub-title for Declaratory Judgment, section 3-401-415 of the Annotated Code of Maryland — 1974 Edition. This section was formerly under Article 31A, of the Annotated Code of Maryland — 1957 Edition. This Act is now known as the Maryland Uniform Declaratory Judgment Act.

PARTIES

2. James R. Grattan is a white male resident of the State of Maryland and citizen of the United States, who was employed as the Director of Minority Relations at the Coppin State College for more than five (5) years prior to his dismissal of August 1, 1976.

3. Adrienne S. Hedman is a white female resident of the State of Maryland and citizen of the United States, employed as a Minority Relations Counselor at the Coppin State College and was so employed for a period of more than five (5) years prior to her dismissal on August 1, 1976.

4. The Defendant, Calvin W. Burnett is President and Chief Administrative Officer of Coppin State College.

5. The Defendant, J. Carson Dowell is Chairman of the Board of Trustees of Maryland State Colleges and Universities, the governing body of Coppin State College.

6. Edmund C. Mester is the Executive Director of the Board of Trustees of the Maryland State Colleges and Universities, which is the governing body of Coppin State College.

7. Ronald K. DeSouza is Vice-President in charge of Student Personnel at the Coppin State College, and Vice-President of Student Affairs at said college.

8. Marvin Mandel is the Governor of Maryland, the Chief Executive Officer of the State.

CAUSE OF ACTION

9. All of the acts or practices complained of herein were being committed in the State of Maryland.

10. At all times relevant to this Complaint, the Defendants were State officials responsible for the employment of Plaintiffs, all of whom were public employees.

11. The Plaintiffs performed satisfactorily as Administrative Staff members at Coppin State College. In the past, members of the Administrative Staff who performed satisfactorily were retained at Coppin State College, and in fact, the Plaintiffs had been retained from year to year on the Administrative Staff at Coppin for more than five (5) years.

12. The reasons given for the non-renewal of Plaintiffs' contracts have been contradictory, inconsistent with prior and present practices on the campus, contrary to the wishes of the departments in which the Plaintiffs are employed, and unsupported by any evidence.

13. The said activities of the said Defendants and each of them are arbitrary, capricious, without basis in fact or law, illegal and invalid. Said activities of said Defendants will deprive the Plaintiffs of property without due process of law, contrary to and in violation of Article 23 of the Declaration of Rights of the Constitution of Maryland and the due process Clause of the Fourteenth Amendment to

the Constitution of the United States and will deny the Plaintiffs the equal protection of the laws, contrary to and in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

VIOLATION OF LAW

14. It is the contention of the Plaintiffs that their dismissal by the Defendant Burnett on August 1, 1976, as a result of the recommendation of the Defendant DeSouza was illegal.

15. In accordance with Article 77 A, Section 12 of the Annotated Code of Maryland, Sub-section (e)-College Presidents, the following is stated:

> "The President shall nominate for appointment by the Board of Trustees, and may recommend for dismissal by the Board all heads of departments, all teachers, and all assistants of whatever kind."

16. In the By-Laws of the Board of Trustees of the State Colleges and Universities of Maryland in Paragraph No. Seven (7), the above language is used verbatum (sic) under Paragraph Seven of said By-Laws. Basically it is stated that the President may recommend for dismissal by the Board all administrative staff, all heads of departments and all teachers and assistants of whatever kind.

17. The By-Laws of the Board of Trustees of the State Colleges and Universities of Maryland further state in Paragraph No. Ten (10) that there is delegation of duty to the President of appointments of classified personnel only. It is further contended the By-Laws of the Trustees of the State Colleges and Universities or the Annotated Code of Maryland as stated in the above Article and Section does not permit dismissal by the Defendant Burnett as recommended by the Defendant DeSouza which was done in this case.

18. It is contended that the Plaintiff Grattan, who was the Director of Minority Relations at Coppin State College

and whose main function was the recruitment of "other race" (non-black) students at the college, was prevented, hampered and harassed from obtaining the necessary assistance needed for his program for recruitment. It should be noted that Coppin State College is 90% black and the "other race" students would be white, American Indian, Hispanic American and Asian American students. In the year of 1975, and more particularly, in the year of 1976, the Defendants Burnett and DeSouza had expressed hostility in a variety of ways towards these Plaintiffs and had prevented the Plaintiff Grattan and his staff from actually pursuing their main task of "other race" recruitment. Such things as the cutting of their budget, preventing them from making long distance phone calls, disallowing wrestling matches which could advance "other race" recruitment, are a few of the many things that were done by these Defendants which created interference with the recruitment program for which the Plaintiff Grattan was responsible.

19. That it is the contention of tne Plaintiff Hedman that her main purpose was for counselling "other race" students at Coppin State College, however, she was discharged because the Defendants were dissatisfied with her recruitment efforts in the Minority Affairs office.

20. It is the contention of both Plaintiffs that despite the total lack of cooperation by the Defendants, Burnett and DeSouza, the recruitment of "other race" students as the result of the efforts by the Plaintiffs showed that recruitment had not fallen off at Coppin State College in 1976, but had improved. As compared to other colleges that had a majority black enrollment, the recruitment percentage of "other race" students at Coppin State College was superior to these colleges.

21. The Defendants Burnett and DeSouza did many things within their power to obstruct the "other race" recruitment program that had been advanced by the Plaintiffs for the past five (5) years. Another example is that there was a conference held out of State pertaining to

the recruitment of "other race" students, that when the Plaintiff Grattan requested that he be allowed to attend said conference, he was turned down by the Defendants Burnett and DeSouza. However, these Defendants sent the Director of Student Activities to the conference in place of the Director of Minority Race Relations.

22. All actions that were in derogation of the Plaintiffs' constitutional rights were taken under the authority vested in the Defendants, Mester, Dowell and Board of Trustees, by virtue of their appointment by and responsibility to the Defendant, Marvin Mandel.

23. Plaintiffs and each of them have performed satisfactorily as Administrative Staff members of Coppin State College. In the past, the Administrative Staff members who performed satisfactorily were retained at Coppin State College and in fact, the Plaintiffs have been retained from year to year on the Administrative Staff at Coppin State for more than five (5) years.

24. The illegal dismissal of the Plaintiffs has caused and will continue to cause loss of employment, extreme financial hardship and loss of professional standing and will hamper and inhibit them in the continued exercise of rights protected by the First and Fourteenth Amendments of the United States Constitution.

25. The Plaintiffs were dismissed from Coppin State College on August 1, 1976, however, the Defendants, J. Carson Dowell, the the Board of Trustees of the Maryland State Colleges and Universities acted belatedly in relation to the dismissal of the Plaintiffs. As a matter of fact, the Board did not act on the dismissal until September 2, 1976.

PRAYERS FOR RELIEF

WHEREFORE, the Plaintiffs pray this Honorable Court to grant the following relief:

a) Make a determination as to the legality of the dismissal of the Plaintiffs on August 1, 1976. It is the

contention of the Plaintiffs that their dismissal was illegal and arbitrary.

b) That if said dismissal was illegal then it is respectfully requested that the Plaintiffs be reinstated to the positions they held at the Coppin State College as of August 1, 1976, and they receive all privileges due them which include but are not limited to wage losses and wage increases, leaves of absents, (sic) vacation pay, sick pay and all other privileges denied them as a result of their improper discharge.

c) In the alternative, if it is decided that the Plaintiffs' dismissal was not illegal, arbitrary or capricious, then the Plaintiffs request this Court to designate the proper forum for a grievence hearing to which they may be entitled.

(1) They Plaintiffs request if said hearing is necessary, it should be done by the Department of Personnel, for the State of Maryland.

(2) It is the Defendants' contention that said hearing should be by a three party panel at Coppin State College and said panel should be appointed by Dr. Calvin Burnett, and after taking said testimony they should make their recommendation to Dr. Burnett. It is the Defendants' further contention that Dr. Burnett may totally disregard the panel's recommendation and make his own independent decision.

This method is strenuously objected to by the Plaintiffs because it places the ultimate power of dismissal or re-instatement in the hands of the party who originally dismissed the Plaintiffs.

d) Grant such other and further relief as the nature of their cause may require.

AND, as in duty bound, etc.

Signatures Omitted

(Title Omitted)

AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT

(Filed October 13, 1981)

Plaintiffs, by their undersigned counsel, file this Amended Bill of Complaint pursuant to Maryland Rule 320 and the Order of this Court entered on September 10, 1981, sustaining Defendant's (sic) Demurrer with leave to amend. Plaintiffs supplement this complaint by adding hereto Count V, pursuant to Maryland Rule 379, based on events that occurred subsequent to the filing of the initial complaint.

COUNT I

INTRODUCTORY STATEMENT

1. Plaintiffs bring this count under 42 U.S.C. Secs. 1981, 1983, 1985 and 1986 and Art. 23 of the Declaration of Rights of the Constitution of Maryland to redress discrimination on the basis of race (white) by the Defendants herein in the dismissal of Plaintiffs from their public employment and with respect to Plaintiffs' compensation, terms, conditions and privileges of employment, and to redress further a conspiracy among certain of the Defendants to violate Plaintiffs' rights as aforesaid and, further, to redress the neglect of such a conspiracy by certain of the Defendants herein who had knowledge of such conspiracy, had the authority and power to end it, but failed to do so. Plaintiffs seek compensatory and punitive damages, equitable and declaratory relief, costs of suit and reasonable attorneys' fees.

JURISDICTION

2. The jurisdiction of this court is invoked pursuant to the general original jurisdiction of the Circuit Courts of Maryland, including the various courts of the Supreme

Bench of Baltimore City, as codified at Sec. 1-501 of the Courts Art., *Anno. Code of Maryland.*

PARTIES

3. James R. Grattan ("Grattan") is a white resident of the State of Maryland and citizen of the United States. Grattan was employed by Coppin State College for more than five (5) years prior to his dismissal for such employment on or about August 1, 1976.

4. The Plaintiff Adrienne S. Hedman ("Hedman") is a white female citizen of the United States and at all times pertinent hereto was a resident of the State of Maryland. Hedman was employed by Coppin State College for approximately five (5) years prior to her dismissal from such employment on or about August 1, 1976.

5. The Defendant Calvin W. Burnett ("Burnett"), a black male, is and was at all times pertinent hereto President and chief administrative officer of Coppin State College, a public institution of higher education operated by the State of Maryland under the governance of the Defendant Board of Trustees of the State Universities and Colleges of Maryland, which was at all times pertinent hereto the employer of Plaintiffs.

6. The Defendant J. Carson Dowell ("Dowell") was at all times pertinent hereto Chairman of the Board of Trustees of the State Universities and College of Maryland.

7. The Defendant Edmund C. Mester ("Mester") was at all times pertinent hereto Executive Director of the Board of Trustees of the State Universities and Colleges of Maryland.

8. The Defendant Ronald K. DeSouza ("DeSouza"), a black male, is and was at all times pertinent hereto Vice-President of Student Affairs at Coppin State College and in this capacity was the direct superior of the Plaintiff Grattan at the time of the termination of the Plaintiffs' employment by Coppin State College.

9. The Defendant Harry Hughes* is Governor of Maryland and head of the Executive Branch of the State government, which includes, *inter alia*, the Defendant Board of Trustees of the State Universities and Colleges and Coppin State College.

STATEMENT OF FACTS

10. The Plaintiff Hedman commenced her employment at Coppin State College on or about August 23, 1971, initially working as a counselor in the Special Service Program, which was responsible for counseling students with special academic needs to help them remain in school. Plaintiff Hedman's assignment to this program was particularly appropriate in view of her academic preparation, which consisted, *inter alia*, of a Master's Degree in counseling from the University of Maryland, College Park. She also held a Master's Degree in Speech and Communication at the time of her hiring by Coppin.

11. In her first year of employment at Coppin, Hedman was deprived of a benefit accorded other, black and male employees, in that she was denied a cost-of-living raise effective for other State employees as of January, 1972, and a "step" increase that was effective for other, similarly situated employees of Coppin as of July 1, 1972. No blacks were treated in this manner at any time pertinent hereto.

12. During the summer following Hedman's first academic year of employment at Coppin, two persons, both black, were hired as counselors in the Special Services Program. Although the qualifications of neither were equal to those of Hedman, both were paid at rates equal to or greater than that paid Hedman. Furthermore, one of the two persons so hired was appointed Assistant Director of the Special Services Program, although this person lacked Hedman's experience in the Program and was lesser qualified academically than Hedman. The person

* The Defendant Governor Hughes is sued in his official capacity and is substituted for former Governor Mandel.

appointed Assistant Director as aforesaid, a black female, had no greater duties and responsibilities than did Hedman and performed with lesser skill and expertise than did Hedman.

13. In her second year of employment at Coppin, Hedman was treated adversely by her supervisor, Mrs. Mary B. Adams, as compared to other, black employees assigned to the same program as Hedman. Such adverse treatment included an attempt by the aforesaid supervisor, by means of a purportedly urgent recommendcation to the Defendant Burnett, as president of the College, to effect the immediate dismissal of Hedman on the basis of allegations known or suspected by the supervisor to be false, or in any event highly subjective and lacking any basis in fact. As a result of this patently false and scurrilous attack upon Hedman, the Defendant Burnett, who also knew or should have known of the falsity or otherwise improper nature of the allegations purportedly supporting the recommendation by Mrs. Adams concerning Hedman, ordered the removal of Hedman from her assignment to the Special Services Program, causing Hedman a substantial loss of professional opportunity, as well as emotional distress, pain and anguish. The removal as aforesaid of Hedman from the Special Services Program was effective on or about November 3, 1972, although Hedman remained, for accounting and payroll purposes, on the payroll of the Special Services Program for some weeks subsequent to November 3, 1972. No blacks were treated in this manner at any time pertinent hereto.

14. Subsequent to November 3, 1972, Hedman was deprived totally of any opportunity of advancement or professional growth at Coppin; in fact, she was assigned no work for some weeks and was directed not to report for work for a significant period of time. No blacks were similarly treated at this time or at any other time pertinent hereto.

15. On or about January 24, 1973, Hedman received a faculty contract for the period December 6, 1972, through

June 30, 1973, and was asked to function as a counselor in the College Counseling Center under the direction of the Dean of Students, one Charles Wright.

16. In early June, 1973, Hedman expressed to the aforesaid Dean Charles Wright her desire to continue serving as a counselor in the College Counseling Center. From that time until August, 1973, Hedman made repeated attempts to determine whether she would receive a contract for the 1973-74 academic year and, if so, what kind of contract (*i.e.*, faculty or supporting staff). In late August, 1973, Hedman was informed that she was being reassigned to the College's "Integration Office," which was formally denominated the Office of Minority Relation and was responsible for recruiting and counseling non-black students. Hedman was then advised that there was no other position available for her at the College, despite the fact that Dean Wright and W. William Nicholsonne, who served as both Director of Financial Aid and Director of Veterans Affairs, had sought the assignment of her to their respective offices.* Despite the efforts of Dean Wright and Mr. Nicholsonne and also the objections of Hedman and the Plaintiff Grattan, who as Director of the Office of Minority Relations had recommended the assignment of another person thereto, Hedman was assigned to that Office at the personal direction of the Defendant Burnett. No blacks were treated in this manner at any time pertinent hereto. Furthermore, all white counselors employed by Coppin, from 1973 through 1976, were assigned to the Office of Minority Relations.

17. Although Hedman was available and ready to work or actually performed her employment duties during the months of August and September, 1973, her name was removed from the payroll of the College for the entire month of August and until on or about September 15, 1973. This occurred in the absence of any notice to

* Hedman also sought appointment to a faculty (teaching) position for which she was qualified, but, for reasons not known to her, was not accepted for such an appointment.

Hedman that she was not being rehired for the 1973-74 academic year and, indeed, in the absence of any notice of any kind. The College is and was required to give notice prior to the end of one academic year if a professional employee is or was not to be rehired for the following year. No blacks were treated in this manner at any time pertinent hereto.

18. At approximately the same time as Hedman's forced assignment to the Office of Minority Relations, a black female was assigned to a counseling position within the College Counseling Center, despite the fact that her qualifications and experience were inferior to those of Hedman and despite the fact that Hedman had satisfied any or all requirements or indicating her wish to be assigned as a counselor to the College Counseling Center.

19. During the 1973-74 academic year, the Director of Financial Aid, Mr. Nicholsonne, again requested that Hedman work in his office. Mr. Nicholsonne asked Hedman to work in his office, and he also made this request to the Vice-President for Student Affairs, the Defendant Mr. Ronald DeSouza, *i.e.*, that Hedman be assigned to the Office of Financial Affairs. DeSouza denied Mr. Nicholsonne's request, on grounds that such a reassignment of Hedman would "affect the Integration Office," as the Office of Minority Relations was called. Previously, however, DeSouza had been asked by Hedman to effect her transfer out of the Integration Office, and DeSouza had replied that he would "keep you in mind." At no time did DeSouza indicate directly to Hedman that she would not be permitted to transfer out of the Integration Office. Subsequent to DeSouza's rejection of Mr. Nicholsonne's request that Hedman be assigned to his office, a black female was hired for the position that Hedman had been offered by Mr. Nicholsonne, which position Mr. Nicholsonne had requested that DeSouza permit him to fill by the reassignment of Hedman. The black female hired for this position had qualifications and experience that were inferior to those of Hedman.

20. In approximately June, 1974, two vacancies occurred (either from departures of personnel assigned there or because of the allocation of additional "slots") in the College Counseling Center. These positions were never advertised, however, and were filled without Hedman being given an opportunity to apply for them, although Hedman was qualified, because of having completed or virtually completed the course work for a graduate degree in counseling, and experienced in the Counseling Center and although DeSouza had assured Hedman that he would keep her in mind in the event of any vacancy for a counselor in the College Counseling Center, which was within DeSouza's area of administrative responsibility as Vice President for Student Affairs. Both of those hired for the two counseling positions were black. One, a black male, had no credentials in counseling and no advanced degree of any kind, and yet received a salary equal to or greater than that received by Hedman.

21. In approximately July of 1975, another counseling position became available in the College Counseling Center, and a black female was assigned there as a counselor, despite her lack of academic credentials in the field of counseling and the lack of an advanced degree. Hedman had in no way rescinded or retracted her request to be assigned to a counseling position and thus had fulfilled any requirements that she apply for such a position.

22. In approximately February, 1975, a Mr. Lynn Jones was appointed Director of the College Counseling Center, where Hedman was assigned from time to time to work with Counseling Center personnel on special projects, despite the refusal, as aforesaid, to assign her to the Center on a permanent basis. In his capacity as Director of the College Counseling Center, Mr. Jones, who is black, reported directly to DeSouza, and DeSouza reported directly to Burnett. In his relationship with Hedman, Mr. Jones was from the outset hostile and abusive; his treatment of her was different from the treatment that he

accorded black and male subordinates. Mr. Jones requested reports from Hedman that he did not request from black and male subordinates, and he made Hedman account for her whereabouts to a far greater degree than Hedman's black co-workers, although Mr. Jones was not Hedman's supervisor. Also, Mr. Jones refused to coordinate his use of and demands for the services of Hedman with Hedman's immediate supervisor, the Plaintiff Grattan. Mr. Jones also made complaints to DeSouza about Hedman, alleging falsely that she was refusing to cooperate in performing her counseling duties. During this period, black counselors regularly assigned to the College counseling Center received no supervision from Mr. Jones, despite their lack of academic preparation in the field of counseling and despite their general failure to observe normal working hours and despite the fact that Hedman had considerably more seniority at Coppin than any of the black counselors.

23. On or about June 17, 1976, Hedman was notified in writing by DeSouza was (sic) recommending to Burnett that her employment contract not be renewed for the 1976-77 academic year. As grounds for his decision, DeSouza cited Hedman's failure to recruit effectively "other race" (i.e., nonblack) students, although he acknowledged that Hedman had "been involved in a counseling function which is directed towards the retention of 'other race' students." In fact, Hedman spent approximately two percent of her working time on recruitment and the remainder of her time on counseling or counseling-related activities. Further, contrary to the recommendation by DeSouza, the percentage increase in admission of "other race" students at Coppin was one of the largest increases among the various predominantly or majority-black compuses of the public colleges and universities in the State of Maryland, despite persistent interference and undermining of the operation of the Office of Minority Relations by DeSouza, Burnett and other administrators of Coppin. Blacks were not treated in this manner at any time pertinent hereto.

24. Burnett approved the recommendation of DeSouza without affording Hedman an opportunity to rebut the assertions contained in DeSouza's recommendation, and thereafter Hedman was denied an opportunity to have a grievance heard on the subject of her dismissal. Hedman experienced repeated difficulties in obtaining a contract for each succeeding year. In fact, Hedman never received notice in any academic year of whether or not she would be retained for the following year at such a time as to allow her to seek other employment for such following year. Indeed, Hedman received no contract at all for the 1974-75 academic year. Blacks were not treated in this manner at any time pertinent hereto.

26. The Plaintiff James R. Grattan was initially employed at Coppin State College in 1969, and in 1973 was appointed to the position of Director of the Office of Minority Relations. In this capacity, Grattan was responsible for recruiting non-black students and for insuring that counseling and other supportive services and assistance were made available to them.

27. In discharging his responsibility for the recruitment of non-black students, Grattan undertook to make Coppin State College more visible to prospective non-black students in the central Maryland area, organizing such events as wrestling tournaments and making hundreds of visits to high schools in the said area. Scheduling and coordinating these efforts required extensive use of long-distance telephone calls. Grattan also sought to provide support for non-black students at Coppin, by providing them with counseling services and assistance with their day-to-day problems at the college. Grattan also sought to improve his expertise in recruiting non-black students, by *e.g.*, attending workshops and conferences.

28. During the time of the Plaintiff Hedman's assignment to the Office of Minority Relations and during the directorship of the Plaintiff Grattan of the Office of Minority Relations, the Defendants Burnett and DeSouza actively interfered with, hindered, obstructed and ham-

pered the functioning of the said Office of Minority Relations, and the Defendants DeSouza and Burnett further conspired to violate the rights of Plaintiffs and of non-black students at Coppin State College and prospective students to enjoy equal protection of laws and equal privileges and immunities, and in so conspiring, the Defendants DeSouza and Burnett injured the persons and property of the Plaintiffs herein. More particularly, the defendants DeSouza and Burnett acted (sic) and between themselves and with others, to interfere with, hinder, obstruct and hamper the functioning of the Office of Minority Relations in the following ways (which are merely examples and do not purport to be an exhaustive enumeration of the Defendants DeSouza's and Burnett's wrongdoing): (1) By corruptly denying the Plaintiff Grattan the opportunity to attend a conference in Atlanta, Georgia, held specifically for the purpose of assisting personnel of predominantly or majority-black colleges in the recruitment of non-black students, while the Director of Student Activities was permitted to attend the aforsaid conference, although the Plaintiff Grattan was primarily responsible for the recruitment and retention of non-black students, rather than the aforesaid Director of Student Activities; (2) denial of long-distance telephone privileges to the Office of Minority Relations; (3) the summary and capricious or malicious cancellation of a wrestling tournament that had been organized by the Plaintiff Grattan for the purpose of enhancing the perception of Coppin State College among non-black students and prospective students; and (4) failing and refusing to provide the amount and degree of administrative and logistical support for the Office of Minority Relations that was and is ordinarily and customarily provided for other organizational components of Coppin State College.

29. Despite the aforesaid acts and conspiracy by and between and among the Defendants DeSouza and Burnett and others to interfere with, hinder, obstruct and hamper the operation of the Office of Minority Relations, non-black enrollment at Coppin State College increased

substantially during the time of Plaintiff Grattan's directorship of the Office of Minority Relations, and such increase was caused and effected in substantial part by and because of the efforts of Plaintiff Grattan and the staff of the Office of Minority Relations. In fact, non-black enrollment at Coppin State College increased to such a degree during the time of the Plaintiff Grattan's directorship of the Office of Minority Relations that the College was able to meet the desegregation goals set out for it in the State's plan for desegregating higher education. Most or all of the other majority- and predominantly-black campuses in Maryland did not meet their desegregation goals during this time.

30. Despite the success of the Office of Minority Relations in recruiting and retaining non-black students during the tenure of the Plaintiff Grattan as its director, or perhaps because of such success, Grattan was notified on June 17, 1976, by the Defendant DeSouza that he was recommending that Grattan's employment not be continued for the following academic year, 1976-77. In so notifying Grattan of his recomendation, the Defendant DeSouza falsely alleged that the Office of Minority Relations and Grattan had failed to perform satisfactorily in the recruitment and retention of non-black students at Coppin State College. In furtherance of the aforesaid conspiracy to violate the rights of Grattan and of non-black students at Coppin and non-black prospective students to equal protection of laws, the Defendant Burnett summarily approved the recommendation of DeSouza, and the dismissal of Grattan was thereby effectuated, although the said dismissal was *ultra vires* because it lacked the requisite approval of the Defendant Board of Trustees of the State Universities and Colleges of Maryland.

31. The Defendant Edmund C. Mester had knowledge of the aforesaid acts by the Defendants DeSouza and Burnett and further of the aforesaid conspiracy to violate the rights of Plaintiffs and of non-black students and prospec-

tive students; the Defendant Mester further had the power and authority to terminate and procure redress of the acts and the conspiracy complained of herein, but Mester failed and refused to exercise such authority and power and permitted the aforesaid acts and conspiracy to continue and to remain unredressed.

32. The Defendant J. Carson Dowell knew or should have known of the aforesaid acts and conspiracy, had the authority and power to terminate and procure redress of the aforesaid acts and conspiracy, but failed to terminate or procure redress as aforesaid.

33. The Defendants acted and conspired as aforeaid deliberately, maliciously and knowingly in violation of the Constitutional rights of the Plaintiffs as aforesaid, and they and each of them so acted under color of state law. The Defendants Burnett, DeSouza, Mester and Dowell are sued in their individual, or personal, capacities, and the Defendants DeSouza and Burnett are also sued in the their official capacities for the purpose of equitable and prospective relief.

34. By their acts, omissions, conspiracy and neglect of conspiracy as aforeaid, the Defendants herein caused or unlawfully permitted the Plaintiffs to be subjected to invidiously discriminated against, by means of disparate and adverse treatment in their employment and termination from their public employment, on the basis of their race.

35. As a direct and proximate result of the invidiously discriminatory acts and omissions complained of herein and of the conspiracy so to discriminate and of the neglect of such conspiracy, Plaintiffs were subjected to the loss of their public employment, to substantial losses of salary and compensation and other monetary losses, humiliation and embarrassment, grievious emotional distress and anguish, loss of professional opportunities, and grievious injury to their personal and professional reputations.

STATEMENT OF CLAIMS

36. The Defendants Burnett and Desouza, by invidiously discriminating against Plaintiffs on the basis of their race, as aforesaid, have violated Plaintiffs' right to equal protection of laws guaranteed them by the Fourteenth Amendment to the United States Constitution, and as further guaranteed by Art. 23 of the Declaration of Rights of the Constitution of Maryland.

37. The Defendants Burnett (sic) DeSouza, by conspiring between themselves and with others to deprive Plaintiffs of their right to equal protection of laws and equal privileges and immunities, have violated 42 U.S.C. Sec. 1985.

38. The Defendants Mester and Dowell, by failing to act upon their knowledge of the existence of the aforesaid conspiracy to violate the rights of Plaintiffs, as aforesaid, although the Defendants Mester and Dowell had the authority and power to terminate and procure redress of the said conspiracy, have violated 42 U.S.C. Sec. 1986.

RELIEF SOUGHT

WHEREFORE, Plaintiffs pray the following relief:

39. The award to each of the Plaintiffs of $250,000 as compensatory damages with said damages to be apportioned among the Defendants Burnett, DeSouza, Mester, and Dowell, in their individual, or personal, capacities.

40. The award of $100,000 in punitive damages to each of Plaintiffs, with such punitive damages to be apportioned among the Defendants Burnett, DeSouza, Mester, and Dowell in their individual, or personal, capacities.

41. An injunction enjoining and restraining the Defendant Governor Harry Hughes, the Defendant Board of Trustees of the State Universities and Colleges, and the Defendant Burnett and DeSouza, in their official capacities, from failing or refusing to reinstate Plaintiffs to their

public employment, with full back pay, as if they had not been wrongfully discharged from such employment.

42. Award of costs of suit and reasonable attorneys' fees.

43. Such other and further relief as Plaintiff's (sic) cause may require.

COUNT II

INTRODUCTORY STATEMENT

1. The Plaintiff Adrienne S. Hedman brings this count under 42 U.S.C. Section 1983 and Articles 23 and 46 of the Constitution of Maryland to redress discrimination on the basis of sex in the termination of her public employment and in the compensation, terms, conditions and privileges of her public employment, in violation of the Fourteenth Amendment to the United States Constitution and the aforesaid Articles 23 and 46 of the Constitution of Maryland. The Plaintiff seeks compensation and punitive damages, equitable relief, costs of suit and reasonable attorneys' fees.

JURISDICTION

2. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraph 2 of Count I.

PARTIES

3. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraphs 3 through 9 of Count I.

STATEMENT OF FACTS

4. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraphs 10 through 26.

5. The Plaintiff Hedman further alleges that, with the exception of the matters alleged in Paragraphs 26 through

30, no similarly situated male employee of Coppin State College was treated as Plaintiff Hedman was treated.

6. As a direct and proximate result of the acts, omissions, conspiracy and neglect of conspiracy as alleged herein, the Plaintiff Hedman was caused to suffer loss of her public employment, substantial loss of income, other monetary losses, great emotional distress and anguish, great humiliation and embarrassment, grievous injury to her personal and professional reputations, and great loss of professional opportunity.

STATEMENT OF CLAIMS

7. The Defendants Burnett and DeSouza, by invidiously discriminating against the Plaintiff Hedman as aforesaid, have violated her right to equal protection of laws as guaranteed by the Fourteenth Amendment to the United States Constitution as by Article 23 of the Declaration of Rights of the Constitution of Maryland, and have further violated the Plaintiff Hedman's right not to be discriminated against on the basis of sex as guaranteed by Art. 46 of the Declaration of Rights of the Constitution of Maryland.

RELIEF SOUGHT

WHEREFORE, Plaintiff Hedman prays the following relief:

8. Award of $250,000 in compensatory damages, apportioned against the Defendants Burnett, DeSouza, Mester, and Dowell in their individual, or personal, capacities.

9. Award of $100,000 in punitive damages, apportioned among the Defendants Burnett, DeSouza, Mester, and Dowell in their individual, or personal, capacities.

10. An injunction enjoining and restraining the Defendant Board of Trustees of the State Universities and Colleges, the Defendant Governor Harry Hughes, and the Defendants Burnett and DeSouza in their official capaci-

ties from failing or refusing to reinstate the Plaintiff Hedman to her public employement, as if she had not been wrongfully discharged, and with full back pay.

11. Award of costs of suit and reasonable attorneys' fees.

12. Such other and further relief as Plaintiff's cause may require.

COUNT III

INTRODUCTORY STATEMENT

1. The Plaintiff James R. Grattan brings this count under 42 U.S.C. Section 1983 and Article 19 of the Declaration of Rights of the Constitution of Maryland to redress the violation of his right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution and by the aforesaid Article 19 of the Declaration of Rights of the Constitution of Maryland. Plaintiff Grattan seeks compensatory and punitive damages, injunctive relief, and costs of suit and reasonable attorneys' fees.

JURISDICTION

2. The Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraph 2 of Count I.

PARTIES

3. The Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraphs 3 through 9 of Count I.

STATEMENT OF FACTS

4. The Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraphs 26 through 35 of Count I.

5. Some months prior to the Plaintiff Grattan's dismissal from his public employment, the Defendant DeSouza demanded to know from him if he were "pushing" the idea of a "white students union." Such demand was made by Defendant DeSouza at a staff meeting and was

calculated to embarrass and humiliate Grattan. Grattan responded by urging that, if white students requested the formation of a "white students union" at Coppin State College, the administration should consider their request. DeSouza angrily retorted that if he ever learned that Grattan was supporting the formation of a "white students union," he (DeSouza) would see to it that Grattan lost his job. The substance of this exchange was thereupon communicated to the Defendant Burnett. The Defendant DeSouza did believe that Grattan was supporting or advocating the establishment at Coppin of a "white students union," and Grattan's employment was terminated because of the Defendant DeSouza's belief in such support and advocacy by Grattan at the formation or establishment at Coppin of such a "white students union." The Defendant Burnett also believed Grattan was supporting or advocating such a "white students union" at Coppin, and for this reason Burnett approved and effectuated the termination of Grattan's employment as aforesaid.

6. The belief by Defendants DeSouza and Burnett was the substantial or motivating factor in the termination of Grattan's employment, and, further, but for the said belief by Defendants DeSouza and Burnett, the employment of Grattan would not have been terminated.

7. At all times pertinent hereto, the Defendants Burnett and DeSouza were acting under color of state law, and with deliberate, knowing, and malicious disregard for their violation of the Plaintiff Grattan's constitutional and legal rights.

8. As a direct and proximate result of the acts complained of herein, the Plaintiff Grattan was caused to lose his public employment, to suffer a substantial financial loss, to suffer further great emotional distress and anguish, to suffer great humiliation and embarrassment, to suffer a grievous loss of personal and professional reputation, and to suffer a loss of professional opportunity.

STATEMENT OF CLAIMS

9. The Defendants DeSouza and Burnett, by causing and effecting the termination of the Plaintiff Grattan's employment for the substantial and motivating reason that they believed he was advocating or supporting the establishment or formation at Coppin State College of a "white students union," have violated the Plaintiff Grattan's right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution, and by Article 19 of the Declaration of Rights of the Constitution of Maryland.

RELIEF SOUGHT

WHEREFORE, the Plaintiff Grattan seeks the following relief:

10. An award of $250,000 in compensatory damages, apportioned among the Defendants Burnett, DeSouza, Mester, and Dowell, in their individual, or personal, capacities.

11. Award of $100,000 in punitive damages, apportioned among the Defendants Burnett, DeSouza, and Dowell, in their individual, or personal, capacities.

12. An injunction enjoining and restraining the Defendant Governor Harry Hughes, the Defendant Board of Trustees of the State Universities and Colleges of Maryland, and the Defendants Burnett and DeSouza in their official capacities, from failing or refusing to reinstate the Plaintiff Grattan to his public employment, as if he had not been wrongfully discharged therefrom with full back pay.

13. Award of the costs of suit and reasonable attorneys' fees.

14. Such other and further relief as the Plaintiff Grattan's cause may require.

COUNT IV

INTRODUCTORY STATEMENT

1. The Plaintiff Adrienne S. Hedman brings this count under 42 U.S.C. Section 1983 to redress the violation of her right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution. The Plaintiff Hedman complains also under Article 19 of the Declaration of Rights of the Constitution of Maryland. Plaintiff Hedman seeks compensatory and punitive damages, equitable relief, and costs of suit and reasonable attorneys' fees.

JURISDICTION

2. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraph 2 of Count I.

PARTIES

3. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraphs 3 through 9 of Count I.

STATEMENT OF FACTS

4. The Plaintiff Hedman hereby adopts and incorporates herein by reference Paragraphs 10 through 25 of Count I, and paragraph 7 of Count III.

5. In the spring of 1976, prior to the notice of June 17, 1976, of the recommendation of the Defendant DeSouza that her employment not be continued for the 1976-77 academic year, the Plaintiff Hedman, in the conscientious, appropriate, and competent performance of her duties as a counselor in the Office of Minority Relations, sought to intercede on behalf of certain white students at Coppin State College who were improperly and unjustly denied the opportunity to be graduated "with honors." The white students were so denied this opportunity and honor because they had transferred to Coppin State College and therefore had not pursued and completed all of their

undergraduate academic work at Coppin. In attempting to intercede on behalf of the said white students, the Plaintiff Hedman protested the decision of the Coppin administration to deny the said white students this opportunity and honor. The said protest, communicated to the Coppin administration and directly or indirectly to the Defendants DeSouza and Burnett, thereupon became the substantial or motivating factor in the discharge of the Plaintiff Hedman from her public employment, as aforesaid.

6. As a direct and proximate result of the actions complained of herein, the Plaintiff Hedman was unlawfully deprived of her public employment, suffered substantial monetary loss, suffered great humiliation and embarrassment, suffered great emotional distress and anguish, suffered grievous injury to her personal and professional reputations, and suffered a substantial loss of professional opportunity.

7. At all times pertinent hereto, the Defendants DeSouza and Burnett were acting under color of state law, and they and each of them further acted with knowing, deliberate, reckless, and malicious disregard for the violation of the Plaintiff Hedman's rights as protected by the United States Constitution and the Constitution of Maryland.

STATEMENT OF CLAIMS

8. By terminating the Plaintiff Hedman's public employment as aforesaid, because of her expressed, good faith opposition to a highly questionable policy or practice of the administration of Coppin State College, the Defendants DeSouza and Burnett violated the Plaintiff Hedman's right of free speech as guaranteed by the First and Fourteenth Amendments to the United States Constitution and also Plaintiff Hedman's right of free speech as guaranteed by Article 19 of the Declaration of Rights of the Constitution of Maryland.

RELIEF SOUGHT

WHEREFORE, Plaintiff Hedman prays the following relief:

9. An award of $250,000 in compensatory damages, apportioned between the Defendants DeSouza and Burnett, in their individual, or personal capacities.

10. An award of $100,000 in punitive damages, apportioned between the Defendants DeSouza and Burnett, in their individual, or personal, capacities.

11. An injunction enjoining and restraining the Defendant Governor Harry Hughes, the Defendant Board of Trustees of the State Universities and Colleges of Maryland, and the Defendants Burnett and DeSouza in their official capacities, from failing or refusing to reinstate the Plaintiff Hedman to her public employment, as if she had not been wrongfully discharged therefrom, with full back pay, with interest.

12. An award of the costs of suit, and reasonable attorneys' fees.

13. Such other and further relief as the Plaintiff Hedman's cause may require.

COUNT V

INTRODUCTORY STATEMENT

1. Plaintiff Grattan brings this action under Sec. 706(k) of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. Sec. 2000e. *et seq.*, hereinafter referred to as "Title VII," to redress discrimination on the basis of race (white) by the Defendants herein in the dismissal of Plaintiff Grattan from his employment and with respect to Plaintiff Grattan's compensation, terms, conditions and privileges of employment. Plaintiff Grattan seeks damages, equitable relief, and costs of suit, including a reasonable attorneys' fee, as a result of the acts and omissions complained of herein.

JURISDICTION

2. The Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraph 2 of Count I.

PARTIES

3. The Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraphs 3 through 9 of Count I.

STATEMENT OF FACTS

4. Plaintiff Grattan hereby adopts and incorporates herein by reference Paragraphs 26 through 35 of Count I.

5. Plaintiff Grattan filed a complaint with the Equal Employment Opportunity Commission on *August, 1976,* alleging discrimination on the basis of race in the termination of his employment and in the terms, conditions, and privileges of his employment.

6. The E.E.O.C. found cause to believe the alleged discrimination had occurred and referred to the United States Department of Justice for litigation. The Justice Department declined to litigate; however, and on *September 10, 1981* a notice of "right to sue" was issued to the Plaintiff Grattan.

STATEMENT OF CLAIMS

7. By discriminating against the Plaintiff Grattan on the basis of his race in the termination of his employment and in the compensation, terms, conditions and privileges of his employment, the Defendant Board of Trustees of the State Universities and Colleges of Maryland, and the Defendants DeSouza and Burnett violated 42 U.S.C. 2000e. *et seq.*

RELIEF SOUGHT

WHEREFORE, Plaintiff Grattan seeks the following relief:

8. Reinstatement to his public employment, as if he had not been discriminatorily and illegally discharged therefrom, with full back pay.

9. Award of costs of suit and reasonable attorneys' fees.

10. Such other and further relief as Plaintiff Grattan's cause may require.

Signatures and Certification Omitted

(Title Omitted)

DEFENDANTS' MOTION TO DISMISS

(Filed November 30, 1981)

Defendants in the above-captioned action, by their undersigned attorneys, move, pursuant to Rule 12 of the Federal Rules of Civil Procedure, that the complaint filed against them be dismissed. As grounds for this Motion, Defendants state as follows:

1. Certain of Plaintiff's claims under 42 U.S.C. §§ 1981, 1983, 1985, 1986 and Articles 19, 23, and 46 of the Maryland State Constitution must be dismissed as time-barred.

2. All claims based on 42 U.S.C. § 1986 are time-barred and must be dismissed.

3. Plaintiffs have failed to state a cause of action under 42 U.S.C. § 1986.

4. Plaintiffs have failed to state a claim under 42 U.S.C. § 1981.

5. Plaintiffs have failed to state a cause of action under § 1983 as neither Plaintiff can show a violation of any property or liberty interest.

6. Certain Defendants are not "persons" within the meaning of 42 U.S.C. §§ 1983, 1985 and 1986.

7. This Court lacks jurisdiction over Plaintiff Grattan's Title VII claims.

8. This Court lacks jurisdiction over each Defendant named in Plaintiff Grattan's Title VII claim as none was named in Plaintiff's charge to the EEOC.

9. Title VII prohibits relief for any alleged unlawful acts occurring prior to December 25, 1975.

10. Plaintiff's Title VII claims against the Board, the Governor and Defendants Mester and Dowell must be dismissed because, as to these Defendants, Plaintiff has failed to state a cause of action.

Signatures and Certification Omitted

EXHIBIT 2 TO DEFENDANTS' MOTION TO DISMISS

COPPIN STATE COLLEGE

2500 West North Avenue

Baltimore, Maryland 21216

VICE PRESIDENT FOR STUDENT AFFAIRS

June 9, 1976

MEMORANDUM

To: Mr. James Grattan
Director of Minority Affairs

From: Ronald K. DeSouza (RKD)
Vice President for Student Affairs

Re: Letter of Appointment — 1976-77

This is to inform you that I am recommending to the President that you not be reappointed for the 1976-77 academic year as the Director of Minority Affairs effective July 15, 1976.

Throughout this past year, I have repeatedly tried to impress upon you the fact that I was not satisfied with the recruitment efforts of the Minority Affairs office. Although

the "other race" enrollment has increased, it is questionable as to the impact the Minority Affairs office has made on the increase.

In your January 28, 1976 Monthly report, you reported "Number of New Other Race Applicants for Admission to Spring Semester, 1976, 23." You reported that of the twenty-three students who were admitted only fifteen registered, of which three were freshmen and twelve were transfers. It is inconceivable to me that with two full-time staff members who have as a *primary* responsibility the recruitment of other race students to the college, only produced three new freshmen and 12 new transfer students for registration in the Spring of 1976.

Thirty-one institutions were visited in January 1976, and in February, twenty-six. In February, only eleven applicants for admission from "other race" students were received. No students were accepted for admission to the college. In March of 1976, you reported thirty-five institutions visited with twenty-nine applications received and eleven students accepted for admission of which four were freshmen and seven transfers. In April, twenty-one institutions were visited, thirteen applications for admission were received with only ten students accepted for admission. (Your report only shows three). In May, 1976, fifteen institutions were visited with seven applications received in admissions and seven students accepted, one freshman and six transfers. Since the recruitment efforts of the office began in October 1975, you have reported only sixty applications received in admissions for "other race" students with only twenty-eight students accepted for Fall 1976 admission as of the date of this memorandum. Your reports submitted to this office do not reflect recruitment efforts which I can continue to support. The salaries paid to you and your staff in the amount of $36,351.00 per year are not justified based on output. If from October 1975 through May 1976, there have only been twenty-eight under-graduate students accepted for admission to the college, the recruitment efforts of the staff are unac-

ceptable for this office since we know that all accepted students will not actually register.

In fairness, your office does have a counseling function which is directed towards the retention of "other race" students, however, I have often told you that if we don't effectively recruit "other race" students, it will not be necessary to provide counseling services. Many of the activities sponsored by your office have been excellent, however, they do not take precedence over the purpose for which the office was established. I asked you to consider developing off-campus opportunities for students and instructed you to touch base with Mrs. Graves, however, as of the date of this memorandum, nothing has been planned or come into fruition.

The administration of the ORG program does not refute, in my mind, the ineffective recruitment efforts of the office since a majority of the awards are made to continuing students and have been awarded to students in our off-campus programs. Awards are also made to students who are attending the institution and were not recruited by the Minority Affairs Office. The increase in ORG funds received from the Board in 1975 were primarily intended to allow for the recruitment of additional "other race" students.

The Minority Affairs Office has not, in my opinion, adequately fulfilled the primary role for which it was intended at Coppin State College. The office, based on output, has not effectively recruited "other race" students. It is my opinion that the successful recruitment of students is primarily based on the ability of one to promote the institution. Although recruitment posters and pamphlets are important, one's ability to convince students to come to Coppin is of more importance.

You were informed, along with the other directors in the Student Personnel Division, that the college was experiencing financial difficulties and there was a possibility that we would not be receiving raises and/or increments for the

1976-77 academic year. Based on that information and your knowledge of the state of affairs of the college, you submitted a request for reclassification. Based on the submission of the reclassification request, in my mind, your commitment to the institution is questionable. In view of my constant warnings to you concerning the need for more output in terms of recruitment, based on the submission of a request for reclassification, I assume that you feel that you are doing a good job. Matters pertaining to HEW reports and affirmative action duties do not in themselves justify a reclassification. Every director in Student Personnel has additional responsibilities which they perform at no additional compensation.

In conclusion, there is nothing personal in my decision, since you have always dealt with me in a most professional manner, however a job must be done and personal feelings must be set aside. I wish you the best in all future endeavors.

EXHIBIT 3 TO DEFENDANTS' MOTION TO DISMISS

COPPIN STATE COLLEGE

2500 West North Avenue

Baltimore, Maryland 21216

VICE PRESIDENT FOR STUDENT AFFAIRS

June 17, 1976

MEMORANDUM

To: Mrs. Adrienne Hedman, Counselor
Minority Relations Office

From: Ronald K. DeSouza (RKD)
Vice President for Student Affairs

Re: Reappointment, 1976-1977

It is with regret that I inform you of my decision to recommend to the President that you not be reappointed

as a member of the Minority Relations Office staff for the 1976-1977 academic year.

My decision is predicated upon a dissatisfaction with the lack of recruitment output in terms of the number of new "other race" students applying and being accepted for admission to the college, which is directly attributable to the recruitment efforts of the Minority Relations Office.

With the primary function of the Minority Relations Office, as mandated by the Board of Trustees, being recruitment, this office cannot justify a salary of $16,301.00 per year for a staff who, although she was not totally responsible for the recruitment of "other race" students, was involved to a large degree.

For the Spring 1976 semester, twenty-three "other race" students applied for admission to the college. Of the twenty-three who applied, only fifteen students registered, of which three were freshmen and twelve transfers. With the number of community colleges in the Baltimore Metropolitan area alone, it seems to me that the Minority Relations Office should have attracted more than fifteen transfer students. From January through May, 1976, you and Mr. Grattan visited approximately 128 institutions with only sixty applicants for admission being submitted to the Admissions Office as of May 31, 1976. Of the sixty applicants received, only twenty-three students have been accepted for admission to the college. Yes, the "other race" enrollment of the college has increased, however, it is questionable as to the impact your efforts have made on the increase. An additional $70,000.00 in O.R.G. monies was given to Coppin last year for the purpose of attracting new "other race" students to the college. The fact that only twenty-three applications for admission were received for the Spring 1976 semester indicate a lack of effective recruitment techniques since there was ample monetary assistance available, brochures and travel money to assist in the staff's recruitment efforts. This office cannot continue to make excuses as to why the staff in the Minority Relations Office is not making significant strides

toward effectively recruiting new "other race" students to the college.

In fairness, you have been involved in a counseling function which is directed towards the retention of "other race" students, however, the *primary* function of the staff is to recruit new "other race" students to the college. Many of the activities sponsored by the office were good, however, they do not take precedence over the primary purpose for which the office was established.

In conclusion, you have not adequately fulfilled the primary purpose of your employment at Coppin State College. Based on output, I am of the opinion that you have not effectively recruited "other race" students. I am also of the opinion that the successful recruitment of students is primarily based on the ability of one to promote the institution. Although pamphlets, posters and counseling efforts directed towards retention are important, one's ability to promote the institution in a manner which will appeal to students is of more importance. There is nothing personal in my decision since you have always dealt with me in a most professional manner, however, a job must be done and personal feelings must be set aside. I wish you the best in all future endeavors.

(Title Omitted)

SUPPLEMENT TO DEFENDANTS' MOTION TO DISMISS

(Filed March 2, 1982)

Defendants, Calvin W. Burnett, J. Carson Dowell, Edmund C. Mester, Ronald K. DeSouza, Harry R. Hughes and the Board of Trustees of the State Universities and Colleges of Maryland, by their undersigned attorneys, move, pursuant to Rule 12 of the Federal Rules of Civil Procedure that an order be issued dismissing each of

Plaintiffs' claims under 42 U.S.C. §§ 1981, 1983 and 1985 for the following reason:

All claims premised on these statutes are barred by limitations.

A Memorandum of Points and Authorities in Support of this Supplement is attached.

Signatures and Certification Omitted

(Title Omitted)

OPPOSITION TO SUPPLEMENT TO DEFENDANTS' MOTION TO DISMISS

(Filed April 1, 1982)

Plaintiffs, James R. Grattan and Adrienne Hedman, by their undersigned attorney, oppose the Supplement to Defendants' Motion to Dismiss each of Plaintiffs' claims under 42 U.S.C. Sections 1981, 1983, and 1985 for the following reason:

The claims premised on these statutes are not barred by limitations.

A Memorandum of Points and Authorities in Support of this Opposition is attached.

Signature and Certification Omitted

Office - Supreme Court, U.S.
FILED
OCT 24 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS,
COPPIN STATE COLLEGE,

Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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The Daily Record Co., Baltimore, MD 21202

COUNTER-STATEMENT OF QUESTION PRESENTED

Did the Court of Appeals err in holding that limitation periods under state statutes establishing administrative procedures for employee complaints of discriminatory discharge are not the most analogous statutes of limitations to apply to federal district court actions to enforce public employee rights under 42 U.S.C. § 1983?

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

Grattan v. Burnett, 710 F.2d 160 (4th Cir. 1983) 3, 4

McNutt v. Duke Precision Dental & Orthopedic Laboratories, 698 F.2d 676 (4th Cir. 1983) 3, 4

Patsy v. Florida Board of Regents, ___ U.S. ___, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) 6, 7

Springfield Township School District v. Madelin H. Knoll, petition for cert. filed, No. 82-1889 8

Statutes

42 U.S.C. § 1983 ..... 1, 2, 6, 7, 8

Maryland Code:

Article 49B 1, 2, 3, 4, 5, 6, 7, 8

Article 64A 1, 2, 5, 6, 7, 8

Treatise

R. Stern and E. Gressman, Supreme Court Practice (5th Ed. 1978) 6

Miscellaneous

COMAR 06.01.03.05 5

Maryland Rule of Procedure B4 6

No. 83-264

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BRIEF OF RESPONDENTS IN OPPOSITION

SUMMARY OF ARGUMENT

1. Contrary to petitioners' contention, the Court of Appeals *did* consider the legislative policies behind Md. Code, Articles 49B and 64A, and correctly determined that the Maryland legislature would not have intended to apply the administrative limitations periods of these statutes to public employee discharge suits under 42 U.S.C. § 1983.

2. Assuming *arguendo* that the Court of Appeals incorrectly determined the question of legislative intent, nevertheless certiorari should be denied, because it would be fundamentally inconsistent with the policies behind 42 U.S.C. § 1983 to allow these administrative limitations periods to govern such lawsuits.

3. Consistency among the circuits on the fundamental issue of the most analogous statute of limitations is both unnecessary and impossible.

For these reasons, the petition for certiorari should be denied.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE MARYLAND LEGISLATURE WOULD NOT INTEND THE LIMITATIONS PERIODS OF MARYLAND CODE, ARTICLES 49B AND 64A, TO GOVERN FEDERAL CIVIL ACTIONS UNDER THE RECONSTRUCTION CIVIL RIGHTS ACTS.

The only issue presented by this petition is whether the Court of Appeals correctly determined that the limitations periods of Maryland Code, Articles 49B and 64A, should not govern federal civil actions under the Reconstruction Civil Rights Acts.[1] The Court of Appeals correctly determined that the Maryland legislature would not intend the limitations periods of Articles 49B or 64A to apply to civil actions under § 1983.[2]

---

[1] Respondents adopt petitioners' nomenclature, and will henceforth refer generically to all claims under the Reconstruction Civil Rights Acts as "§ 1983 claims."

[2] Any discussion in petitioners' memorandum pertaining to the equitable doctrine of laches and of the writ of mandamus in the Maryland courts is totally immaterial. The question is whether the Maryland legislature would apply the limitations periods of Articles 49B or 64A to § 1983 lawsuits. The issue

First, the Court of Appeals adopted the reasoning of *McNutt v. Duke Precision Dental and Orthodontic Laboratories*, 698 F.2d 676 (4th Cir. 1983), in rejecting Article 49B as the most analogous statute. *Grattan v. Burnett*, 710 F.2d 160 at 162 (4th Cir. 1983). In *McNutt*, the Fourth Circuit determined that it was unlikely the Maryland legislature intended a statute which was designed to initiate an informal, investigatory administrative proceeding to govern the timeliness of a lawsuit. As noted in *McNutt:*

> The Court of Appeals of Maryland has observed that the filing of a complaint with Maryland's Human Relations Commission "merely triggers the investigative process." *Banach v. State Commission on Human Relations*, 277 Md. 502, 356 A.2d 242, 249 (1976). The court added that the Legislature "assumed that the [post-filing] investigative process would flesh out the charges made by the individual before the respondent was initially called upon to answer them." *Id.*, 356 A.2d at 250. A relatively short limitations period was clearly thought by the Maryland Legislature as appropriate to such an administrative proceeding, but it does not appear appropriate for application to a judicial proceeding in which the investigatory phase must precede the filing of the complaint.
>
> Moreover, the enforcement schemes contemplated by Maryland's Article 49B and 42 U.S.C.A. § 1981 are completely different. Maryland's administrative proceeding is designed primarily to "eliminate the discrimination by conference, conciliation, and persuasion." See Article 49B, § 10(b) (1982 Cum. Supp.). If a process of conference, conciliation and persuasion is to be effective, claims must be fresh. The older they are the less the likelihood of successful administrative adjustment.

---

therefore is one of legislative intent. Common law doctrines are simply immaterial to the analysis of the issue, as they provide no insight into the fundamental issue of which statute of limitations governs this action.

> In 42 U.S.C.A. § 1981, of course, there is no such conciliation scheme or purpose. It is simply a machine for adversarial enforcement of rights secured by federal law. . . . There is a strong policy against judicial assertion of stale claims, but statutes of limitations clearly applicable to judicial assertion of claims generally contain much longer periods than do those applicable to administrative proceedings where a primary objective is conciliation and attaining voluntary compliance.

McNutt v. Duke Precision Dental and Orthodontic Lab., supra, 698 F.2d at 678, 679.[3]

Similarly, as noted in *Grattan v. Burnett, supra,* 710 F.2d at 162-163:

> We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in *McNutt.* A proceeding under Article 64A is an administrative proceeding and the largest part of it — 130 of the total of 165 days — is spent formally adjudicating a claim initiated by the state. That the Maryland legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof hardly evidences an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel

[3] Although the opinion does not explicitly discuss the point, a further indication of the legislature's intent not to apply Article 49B's limitations period to litigation is apparent from the fact that, except in very limited circumstances, Article 49B does not provide for a private right of action. Article 49B § 10(d), at App. 7, Petition for Writ of Certiorari (hereinafter, "Petition"). Employees can presently seek judicial review only of denials of requests for reconsideration of no probable cause findings, and only if the EEOC does not have jurisdiction over the subject matter of the complaint. At the time this lawsuit was filed, Article 49B contained no provision allowing an aggrieved complainant to initiate any form of judicial review.

> who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code, Article 49B, § 7(b)(1). This, too, indicates that the Maryland legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination.

Petitioners' footnote 9, Petition at 13, seriously misstates the Court of Appeal's position on this issue, and assumes a position inconsistent with the basic thrust of petitioners' argument. It is true that, under COMAR 06.01.03.05, unclassified employees bear the burden of proof in discharge cases. But petitioners elsewhere argue that it is immaterial that respondents are not merit system employees and that Article 64A is therefore not available to them at all. Petition, n. 12 at 19. As a general proposition, the Court of Appeals is correct on the burden of proof issue. If petitioners' are suggesting that the limitations period should vary depending on who had the initial burden of proof, then respondents are equally correct in asserting that time limitations contained in a statutory scheme which isn't even available to these respondents should not govern this action. Petitioners simply cannot have it both ways. As a matter of federal policy, all public employees should be governed by the *same* statute of limitations, irrespective of which statute that may be. Therefore, the Court of Appeal's position on the burden of proof is well taken.

Second, the Court of Appeals nowhere intimates that a public employee can file a discrimination complaint "without regard" to Article 64A. The court simply, and correctly, noted that a public employee is free to file a discrimination complaint after the expiration of 165 days. This is because Article 49B § 9(a) allows for a six month

filing period. As this period exceeds the 165 day period in Article 64A, a public employee who exhausted his/her administrative remedies under Article 64A would still have at least 15 days in which to file a discrimination complaint under Article 49B. This suggests that the legislature did not intend to limit a public employee's right to sue for unlawful discrimination to 165 days.[4]

Contrary to petitioners' argument, the Court of Appeals *did* analyze the legislative policies of Articles 49B and 64A, and correctly determined that the Maryland legislature would not have applied these time limits to a § 1983 action.

II.

THE POLICIES BEHIND § 1983 ARE INCONSISTENT WITH THE POLICIES BEHIND THE LIMITATIONS PERIODS OF MD. CODE, ARTICLES 49B AND 64A.

Assuming *arguendo* that the Court of Appeals determined incorrectly that the Maryland legislature would not have intended Articles 49B and 64A to govern the limitations periods for § 1983 actions, nevertheless the decision is correct because the policies behind § 1983 are inconsistent with the policies of the state statutes.[5]

This Court held only last year that state public employees are not required to exhaust state administrative remedies prior to filing a federal § 1983 action. *Patsy v. Florida Board of Regents*, ___ U.S. ___, 102 S. Ct.

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[4] Similarly, Md. Rule of Procedure B4 allows only for *appellate* judicial review of an Article 64A decision. The decision is on the record, and based on substantial evidence. It is likely that the Maryland legislature would view Rule B4 as an inadequate substitute for jury trial.

[5] Certiorari should be denied if the decision of the lower court is correct, even if the rationale for the decision is incorrect. R. Stern and E. Gressman, Supreme Court Practice (5th Ed. 1978) at 272.

2557, 73 L. Ed. 2d 172 (1982). In doing so, the Court articulated three factors behind § 1983 which would be inconsistent with utilizing the very short administrative limitations periods of Articles 49B and 64A in § 1983 actions. First, the 1871 Congress had determined that the federal courts had a paramount role in protecting constitutional rights. Second, the 1871 Congress expressed its belief that state authorities had been unwilling or unable to protect the constitutional rights of individuals or to punish those who violated these rights. Finally, the 1871 Cogress had viewed § 1983 as providing dual or concurrent forums in the state and federal systems, enabling the plaintiff to choose the forum in which to seek relief. Therefore, a plaintiff need not first invoke a state remedy before invoking the federal remedy.

All three factors strongly militate against applying the very short administrative limitations periods of Articles 49B and 64A to § 1983 actions. If Congress did not intend that § 1983 public employee plaintiffs exhaust state administrative remedies, then surely Congress did not intend that the limitations periods designed to invoke these administrative procedures should nevertheless govern the filing of the federal suit.

III.

CONSISTENCY AMONG THE CIRCUITS IS NEITHER NECESSARY NOR POSSIBLE ON THE FUNDAMENTAL ISSUE OF THE MOST ANALOGOUS STATUTE OF LIMITATIONS.

Petitioners are incorrect in their suggestion that there is a deep division between the circuits on the question presented herein. In fact, a close examination of the cases relied on by petitioners in Part II of their Petition reveals that the First Circuit is alone in allowing state administrative statutes of limitations to govern § 1983 actions. All the other cases cited by petitioner involve a determination as to which *litigation* statute of limitations

period should be applied to § 1983 actions, and, in the final analysis, consistency among the circuits is neither necessary, nor possible, on the fundamental issue of which such statute of limitations is most analogous. Congress has made the policy determination that state statutes of limitation are to govern § 1983 actions. As no two statutes of limitations are identical in all respects, inconsistency among the circuits (and, indeed, within the circuits), is inevitable.

One example of this inevitable inconsistency is the difference between the statutes at issue in the instant case, and the statute at issue in *Springfield Township School District v. Madelin H. Knoll*, petition for cert. filed, No. 82-1889. In the instant case, the two statutes of limitations involve the invocation of administrative procedures. Article 49B is available to all employees, but contains provisions allowing employees to seek limited judicial review of denials of requests for reconsideration of no probable cause findings only if the EEOC does not have jurisdiction over the subject matter of the complaint. Article 64A is available only to *some* public employees, but does contain appellate judicial review for those employees. The statute at issue in *Knoll* requires *all* individuals to file suit against public officials within six months. By its terms, it is not limited to the employment context, and obviously pertains directly to the initial invocation of trial court litigation. Given the differences between these statutes, it would be impossible for this Court to fashion a general rule of universal applicability even if the Court were to accept both cases.[6] Unless this Court is prepared to grant certiorari in at least fifty such cases, the Court should deny certiorari in this case.

[6] Petitioners also concede the inherently local nature of limitations issues. "No one case could resolve all of the possible limitations issues that could arise in a federal court action under 42 U.S.C. § 1983." Petition, at 22.

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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Office - Supreme Court, U.S.
FILED
JAN 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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RONALD K. DESOUZA,
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Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

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QUESTION PRESENTED

When a claim of public employer discrimination is brought under 42 U.S.C. § 1983, and related civil rights statutes, is a federal appeals court free to disregard state policy, clearly reflected in its statutes and common law, that favors abbreviated limitations periods in public employment disputes and to reject such limitations periods because they govern state administrative actions or because they are too short?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
PARTIES	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	13
ARGUMENT:	
I. Maryland's Six Month Limitations Period For Filing Employment Discrimination Claims Is The Most Analogous State Limitations Period For Bias Suits Brought By Public Employees Under 42 U.S.C. § 1983 And Related Civil Rights Statutes	16
II. Application of Maryland's Six Month Limitations Period In A Federal Civil Rights Suit Alleging Employment Discrimination Furthers Important State Policies And Is Entirely Consistent With Federal Laws And Policies	28
CONCLUSION	41

TABLE OF CITATIONS

Cases

Adamson v. Davis, 47 Mo. 268 (1871)	36
Allen v. McCurry, 449 U.S. 90 (1980)	15, 26, 36, 37
Archambau v. Green, 21 Minn. 520 (1875)	36
Arnson v. Murphy, 109 U.S. 238 (1883)	39

PAGE

Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1968) 14, 18

Bacharach v. United Cooperative, 181 Md. 315, 29 A.2d 822 (1943) 5

Bigelow v. Bemis, 2 Allen (Mass.) 496 (1861) 36

Board of Regents v. Tomanio, 446 U.S. 478 (1980) ..... *passim*

Briscoe v. Lahue, 103 S. Ct. 1108 (1983) 31

Burns v. Sullivan, 619 F.2d 99 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) 38

Bush v. Lucas, 103 S. Ct. 2404 (1983) 27, 31

Butz v. Economou, 438 U.S. 478 (1978) 30

Canadian Northern Ry. Co. v. Eggen, 252 U.S. 553 (1920) 39

Carlson v. Green, 446 U.S. 14 (1980) 32

City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 20

Coster v. Department of Personnel, 36 Md. App. 523, 373 A.2d 1287 (1977) 8

Curran v. Portland Super. School Committee, Etc., 435 F. Supp. 1063 (D. Maine 1977) 20

Damazo v. Wahby, 259 Md. 627, 270 A.2d 814 (1970) 23

Delaware State College v. Ricks, 449 U.S. 250 (1980) 20, 25, 26

DelCostello v. International Brotherhood of Teamsters, 103 S. Ct. 2281 (1983).....14-16, 18, 20, 25, 26, 29, 40

DeMoss v. Newton, 31 Ind. 219 (1869) 36

Duffey v. Rickard, 194 Md. 228, 71 A.2d 41 (1950) 12, 15, 23, 30

Elrod v. Burns, 427 U.S. 347 (1976) 33

Evans v. Chesapeake & Potomac Telephone Company, 535 F. Supp. 499 (D.Md. 1982) 10

PAGE

Foman v. Davis, 371 U.S. 178 (1962) 39

Forami v. Reynolds, 248 Md. 246, 236 A.2d 20 (1966) 23

George v. Gardner, 49 Ga. 441 (1873) 36

Grattan v. Burnett, 710 F.2d 160 (4th Cir. 1983) 1, 10, 12, 13

Gray v. Warden, 247 Md. 724, 234 A.2d 603 (1967) 7, 8, 24

Great American Federal Savings and Loan v. Novotny, 442 U.S. 366 (1979) 20

Gregoire v. Biddle, 77 F.2d 579 (2nd Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) 31

Hanna v. Ingram, 53 N.C. 55 (1862) 36

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 16, 31

Harwood v. Marshall, 9 Md. 83 (1856) 22, 23

Heaps v. Cobb, 185 Md. 372, 45 A.2d 73 (1945) 6, 21, 22

Hecht v. Crook, 184 Md. 271, 40 A.2d 673 (1944) 21

Hochstadt v. Worcester Foundation for Experimental Biology, 545 F.2d 222 (1st Cir. 1976) 5

Imbler v. Pachtman, 424 U.S. 409 (1976) 31

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 15, 17, 29, 32, 39

Jones v. House of Reformation, 176 Md. 43, 3 A.2d 728 (1939) 22

Kansas City Southern Ry. Co. v. Wolf, 261 U.S. 133 (1923) 26

Kremer v. Chemical Const. Co., 456 U.S. 461 (1982) 15, 16, 26, 36, 37

Local Lodge v. National Labor Relations Board, 362 U.S. 411 (1960) 16, 39

PAGE

Maine v. Thiboutot, 448 U.S. 1 (1980) 23, 24

Maryland Commission on Human Relations v. Bethlehem Steel, 295 Md. 586, 457 A.2d 1146 (1983) 7

Maryland Commission on Human Relations v. Mass Transit Administration, 294 Md. 225, 449 A.2d 385 (1982) 7

McDonald v. Santa Fe Truck Transportation Co., 427 U.S. 273 (1976) 20

McGill v. General Electric Co., 524 F. Supp. 1126 (D.Md. 1981) 10

McNeese v. Board of Education, 373 U.S. 688 (1963) 22

McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983) 10, 11, 12, 38

Michel v. Tenney, 6 La. Ann. 89 (1851) 36

Missouri P.R. Co. v. Larabee, 234 U.S. 459 (1914) 22

Myers v. Chief of Fire Bureau, 237 Md. 583, 207 A.2d 467 (1965) 25

Ness v. Baltimore, 162 Md. 529, 160 At. 8 (1932) 21

New York Transit Authority v. Beazer, 440 U.S. 568 (1979) 33

Nicholas v. United States, 257 U.S. 71 (1921) 15, 21

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 31

O'Bannon v. Louisville, Cincinnati & Lexington Railroad, 8 Bush (Ky.) 348 (1871) 36

O'Hara v. Kovens, 625 F.2d 15 (4th Cir. 1980) 17

O'Sullivan v. Felix, 233 U.S. 318 (1914) 29, 33, 39, 40

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 16, 34-37

	PAGE
Perry v. Sinderman, 408 U.S. 593 (1972)	33
Pierson v. Ray, 386 U.S. 547 (1967)	31
Polk County v. Dodson, 457 U.S. 312 (1981)	31
Preiser v. Rodriguez, 411 U.S. 475 (1973)	24
Pressman v. Elgin, 187 Md. 446, 50 A.2d 560 (1947)	22
Prince George's County v. Blumberg, 288 Md. 275, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981)	7
Procunier v. Navarette, 434 U.S. 555 (1978)	22
Robertson v. Wegmann, 436 U.S. 584 (1978)	16, 28, 32-34, 37
Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352 (1969)	39
Runyon v. McCrary, 427 U.S. 160 (1976)	18, 29
Scheuer v. Rhodes, 416 U.S. 232 (1974)	31
Soley v. State Commission on Human Relations, 277 Md. 521, 356 A.2d 254 (1976)	7
State Commission on Human Relations v. American Division of Litton Systems, Inc., 278 Md. 120, 360 A.2d 1 (1976)	6
State Department of Assessments v. Clark, 281 Md. 385, 380 A.2d 28 (1977)	25
State use of Isaac v. Jones, 21 Md. 432 (1863)	36
Sullivan v. LaMunyon, 572 F. Supp. 753 (D. Kan. 1983)	18
Tennessee v. Sneed, 96 U.S. 69 (1877)	39
Terry v. Anderson, 95 U.S. 628 (1877)	36
Turner v. New York, 168 U.S. 90 (1897)	39
United Parcel Service v. Mitchell, 451 U.S. 56 (1981)	11, 14, 16, 18, 20, 26, 39
United States v. Hougham, 364 U.S. 310 (1960)	39

PAGE

United States v. Kubrick, 444 U.S. 111 (1979) 29
United States ex rel. Arant v. Lane, 249 U.S. 367 (1919) 14, 15, 21, 23, 29
Walter v. Montgomery County, 179 Md. 665, 22 A.2d 472 (1941) 24
Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir.), *cert. denied*, 423 U.S. 855 (1975) 19
Wheeler v. Jackson, 137 U.S. 245 (1890) 16, 39
Wood v. Carpenter, 101 U.S. 135 (1979) 15, 28
Wood v. Strickland, 420 U.S. 308 (1975) 31
Younger v. Harris, 401 U.S. 37 (1971) 32
Zipes v. TWA, 455 U.S. 385 (1982) 25

Constitutional Provisions, Statutes, Rules and Regulations

United States Constitution, Amendment 1 39
United States Code:
28 U.S.C.—
§ 1254(1) 2
29 U.S.C.—
§ 160(b) 16, 26, 30, 34, 39
42 U.S.C.—
§ 1981 ..... *passim*
§ 1983 ..... *passim*
§ 1985 ..... *passim*
§ 1986 ..... *passim*
§ 1988 ..... *passim*
§ 2000e-5 ..... *passim*
Federal Rules of Civil Procedure:
Rule 8(a) 38
Rule 15 ..... 38, 39

PAGE

Annotated Code of Maryland:
Article 27—
§ 721 30
§ 724 30
Article 49B—
§ 3 7
§ 4 6
§ 7 ..... 2, 5, 27
§ 9 ..... *passim*
§ 10 ..... 5, 6
§ 11 6
§ 12 5
§ 14 ..... 4, 27
Article 57—
§ 1 41
Article 64A—
§ 33 ..... 5, 7
§ 36 8
§ 52 5
§ 54 ..... 5, 8
Courts & Judicial Proceedings Article:
Sections—
3-401–3-415 9
3-8A-02 24
5-101 ..... 2, 13
Education Article:
Sections—
6-202 30
13-1A-01 30
14-110 30

PAGE

Laws of Maryland of 1858:
Chapter 285 22
Laws of Maryland of 1888:
Chapter 454 22
Laws of Maryland of 1983
Chapter 376 8
Maryland Rules of Procedure:
Rule B4 ..... 5, 7, 8
Rule BE44 22
Rule BF 22
Code of Maryland Regulations:
COMAR—
06.01.01.60 ..... 5, 8
06.01.03.05 8
14.03.01.07H(1) 6
14.03.01.08D(2) 7
1826 N.C. Acts ch. 65, § 3 36
1814 S.C. Publ. Stat. tit. 110 § 12 (Brevard) 36
1858 Tenn. Code § 2771 36

Miscellaneous

Annotation: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) 15, 23, 30
Annotation: Mandamus — Allowance of Damages, 73 A.L.R.2d 903 (1960) 22
Annotation: Mandamus — Statute of Limitations, 155 A.L.R. 1144 (1945) 23
Annual Report of the Director of the Administrative Office of the United States Courts (1982) 30

PAGE

Note, Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950) 28

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as *Grattan v. Burnett*, 710 F.2d 160 (4th Cir. 1983); it is set forth in the Appendix to the Petition for a Writ of Certiorari. App. 16.[1] The opinion and order of the District Court for the District of Maryland is not reported; it is set forth in the Appendix to the Petition. App. 23.

[1] References to the Appendix to the Petition for a Writ of Certiorari are cited "App." and reference to the Joint Appendix as "A."

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 22, 1983. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit were James R. Grattan and Adrienne S. Hedman, Appellants, and Calvin W. Burnett, President of Coppin State College; J. Carson Dowell, then Chairman of the Board of Trustees of State Universities and Colleges of Maryland; Edmund C. Mester, then Executive Director of the Board of Trustees of State Universities and Colleges of Maryland; and Ronald K. DeSouza, Vice-President of Student Affairs, Coppin State College, Appellees.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Maryland Annotated Code

Courts & Judicial Proceedings Article

§ 5-101. Three-year limitation in general.

A civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced.

Art. 49B Annotated Code of Maryland

§ 7. Discrimination cases involving State agency, officer or employee.

(b) *Cases in which State agency, etc., is respondent.* — (1) In any employment discrimination case in which an agency, officer or employee of the State of Maryland is a

respondent, the rules, procedures, powers, rights, and remedies which are applicable in such a case shall be those which are applicable in a discrimination case in which a private person is the respondent.

(2) In discrimination cases in which an agency, officer or employee is a respondent, the power of the Human Relations Commission includes the authority to seek injunctive relief or judicial enforcement of its orders against such respondents. (1980, ch. 568; 1983, ch. 376.)

§ 9. Complaint to be filed with or issued by Commission; meetings of Commission.

(a) Any person claiming to be aggrieved by an alleged discrimination prohibited by any section of this article may make, sign and file with the Human Relations Commission (hereinafter referred to as the "Commission") a complaint in writing under oath. The complaint shall state the name and address of the person, firm, association, partnership, corporation, state agency, department or board alleged to have committed the act of discrimination together with the particulars thereof; and the complaint also shall contain such other information as may be required from time to time by the Commission. A complaint must be filed within six months from the date of the occurrence alleged to be a violation of this article. A complaint filed with the federal or with a local human relations commission within six months from the date of occurrence shall be deemed to have complied with the provisions of this section.

(b) Whenever the Commission has received reliable information from any individual or individuals that any person has been engaged or is engaged in any discriminatory practice within the scope of this article, and after a preliminary investigation by the Commission's staff authorized by the chairman or vice-chairman it is satisfied that said information warrants the filing of a

complaint, the Commission, on its own motion, and by action of not less than three commissioners, may issue a complaint in its name in the same manner as if the complaint had been filed by an individual.

(c) The Commission shall meet at least once each month. In addition, the chairman or a majority of the Commission shall have the right at any time to call special meetings of the Commission upon five (5) days notice to the members thereof. The Commission shall establish procedures for the conduct of said meetings.

§ 14. Declaration of policy.

It is hereby declared to be the policy of the State of Maryland, in the exercise of its police power for the protection of the public safety, public health and general welfare, for the maintenance of business and good government and for the promotion of the State's trade, commerce and manufacturers to assure all persons equal opportunity in receiving employment and in all labor management-union relations regardless of race, color, religion, ancestry or national origin, sex, age, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment, and to that end to prohibit discrimination in employment by any person, group, labor organization, organization or any employer or his agents.

Also relevant are the following, all of which are set forth in the Appendix to the Petition for Certiorari, App. 1-15:

42 U.S.C. § 1981

42 U.S.C. § 1983

42 U.S.C. § 1985

42 U.S.C. § 1986

42 U.S.C. § 1988

Annotated Code of Maryland, Article 49B § 10

Annotated Code of Maryland, Article 49B § 12

Annotated Code of Maryland, Article 64A § 33

Annotated Code of Maryland, Article 64A § 52

Annotated Code of Maryland, Article 64A § 54

Maryland Rules of Procedure B4a

Code of Maryland Regulations (COMAR) 06.01.01.60

STATEMENT OF THE CASE

A. *The Maryland Statutes And Regulations Applicable Here*

Under Maryland law, a state employee's exclusive state court remedies for race and sex discrimination in employment are provided by Article 49B and Article 64A of the Maryland Code.

Pursuant to Article 49B, § 7(b), a State employee may file with the Human Relations Commission ("the Commission") a complaint of race or sex discrimination in employment against "agencies, officers and employees of the State of Maryland." However, such a complaint must be filed "within six months from the date of the occurrence" of the alleged discriminatory act. Art. 49B, § 9(a).

Any time after the complaint has been filed, the Commission, and the employee (at the very least in conjunction with the Commission)[2] can go to court to seek

[2] An employee seeking to prevent lost wages is clearly a "[person] interested in the subject matter of [the] suit" so as to enable him to be a party in such an action under Maryland law. *Bachrach v. United Cooperative*, 181 Md. 315, 318, 29 A.2d 822, 824 (1943). *Cf. Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 226 (1st Cir. 1976) (collecting federal cases dealing with the right of an employee to seek preliminary injunction relief under 42 U.S.C. § 2000e-5(f) pending action by the Equal Employment Opportunity Commission).

a temporary injunction "to preserve the status of the parties or to prevent irreparable harm from the time the complaint is filed until the time of its final disposition." Art. 49B, § 4; *State Commission on Human Relations v. American Division of Litton Systems, Inc.*, 278 Md. 120, 122, 360 A.2d 1, 3 (1976) (reserving the issue of whether § 4 authorizes an injunction ordering reinstatement of an employee in an action brought subsequent to the termination of his employment).

After the filing of the complaint, it is investigated by the Commission's staff. Art. 49B, § 10(a). If the Commission finds "no probable cause" for believing a discriminatory act has occurred, the employee can go to court to appeal the Commission's findings, provided that the EEOC "does not have jurisdiction over the subject matter of the complaint." Art. 49B, § 10(d).[3] If probable cause is found, the Commission endeavors to conciliate a settlement agreement. Art. 49B, § 10(b) and (c). If agreement cannot be reached, the employer must answer the charges at an evidentiary hearing before a hearing examiner. Art. 49B, § 11. Although the Commission's general counsel presents evidence at the hearing, the complainant has "the right to be represented by counsel, to be present, and to participate," including the right "to examine and cross-examine witnesses, and to introduce evidence into the hearing." COMAR 14.03.01.07H(1).

If the examiner finds discrimination, the employer is ordered to cease and desist and to take affirmative action to effectuate the purposes of the Human Relations Law and may be obliged to reinstate the employee with back pay. Art. 49B, § 11(e). The Commission's general counsel, the employer and the employee have the right to appeal the examiner's decision to an Appeal Board of the

[3] Even in the absence of such an appeal mechanism, under Maryland law an employee would have the right to bring a mandamus action to review an arbitrary or illegal finding by the Commission of no probable cause. *Heaps v. Cobb*, 185 Md. 372, 45 A.2d 73 (1945).

Commission. Art. 49B, § 3(d); COMAR 14.03.01.08D(2). The Board may affirm, reverse or modify the order of the hearing examiner and that decision, if final, may be appealed on the record to the circuit court under the State Administrative Procedures Act by any party aggrieved by the Commission's order, including an employee. *Maryland Commission on Human Relations v. Mass Transit Administration*, 294 Md. 225, 230, 449 A.2d 385, 387 (1982). When the Commission's order is favorable to the employee, he or she may defend the decision against a circuit court appeal by the employer.

Under Maryland law, these remedies effectively displace any remedy the employee might have had by way of mandamus, injunction or declaratory judgment, *Maryland Commission on Human Relations v. Bethlehem Steel*, 295 Md. 586, 457 A.2d 1146 (1983); *Soley v. State Commission on Human Relations*, 277 Md. 521, 526, 356 A.2d 254, 257 (1976); *Gray v. Warden*, 247 Md. 724, 234 A.2d 603 (1967), including a claim for damages for violation of a constitutional right. *Prince George's County v. Blumberg*, 288 Md. 275, 293, 418 A.2d 1155 (1980), *cert. denied*, 449 U.S. 1083 (1981).

A classified employee of the State in a pre-termination discharge proceeding, and most unclassified employees in a post-termination grievance proceeding, may also have adjudicated the issue of whether his or her discharge was based on race, sex or other protected classifications. These grievance procedures and subsequent judicial review must also be initiated within a short time frame. Charges against a classified employee must be heard within 90 days; a decision rendered within 45 days after the hearing, Md. Code, Art. 64A, § 33; and an appeal to the circuit court of the Secretary of Personnel's decision must be taken within 30 days, Md. Rule of Procedure B4. An unclassified employee who receives a notice of termination has five working days to note an appeal to the Secretary of

Personnel who must hear the case within 30 days and render a decision within another 30 days. COMAR 06.01.01.60. Thereafter, an appeal to the circuit court must be filed within another 30 days, Md. Rule B4.[4] Under Article 64A, as under Article 49B, the administrative and judicial procedures established by law effectively displace any other State court remedy the employee would have had for the violation of his or her rights. *Gray v. Warden, supra,* 247 Md. 724, 234 A.2d 603; *Coster v. Department of Personnel,* 36 Md. App. 523, 373 A.2d 1287 (1977).[5]

B. *The Proceedings Below*

In June, 1976, administrators at Coppin State College, a predominantly black, publicly-funded institution governed by a State board, determined not to renew the employment contracts of two untenured administrative employees, the Respondents herein, James R. Grattan and Adrienne S. Hedman (hereafter the "Respondents" or "the employees"). A. 34-39. Shortly thereafter, these employees filed claims of racial discrimination with the Equal Employment Opportunity Commission, naming as respondent a state agency, Coppin State College, but no individual. App. 24. Hedman also alleged that she was the victim of sex discrimination. *Id.* Neither employee at any time filed a complaint with the Maryland Commission on Human Relations.

[4] In both categories of proceedings the employee presents his or her own case. In pretermination hearings for classified employees, the employer bears the burden of proof; in post-termination hearings for unclassified employees, the employee bears that burden. COMAR 06.01.03.05. In either case, a back pay award is obtainable. Art. 64A, §§ 36 and 54(b).

[5] At one time, a State employee's remedies under Article 49B were tied to those available under Article 64A. In 1983, a grievance notification requirement was eliminated from the law. *See* Chapter 376, Laws of 1983. Now, the remedies under both statutes are distinct.

Seven months later, on February 17, 1977, the employees did bring suit in State court against Petitioners herein, Calvin W. Burnett, the President of Coppin State College, and various other college and state officials and the Board of Trustees of the State Universities and Colleges (hereafter "Petitioners", "President Burnett" or "the State"). A. 5-10. The employees asked the State court to declare, under the Maryland Uniform Declaratory Judgment Act, Md. Code, Courts and Judicial Proceedings Article §§ 3-401–3-415, A. 5, that the non-renewal of their employment contracts in June of 1976 had been accomplished in a manner that violated State law and their rights to procedural due process. A. 6-7. The principal relief requested was reinstatement with back pay; no claim for damages was made. App. 10. The State demurred to the Bill of Complaint. App. 33.

After the demurrer was finally ruled on in 1981 and sustained with leave to amend, the employees filed, on October 13, 1981, an "Amended and Supplemental Bill of Complaint." A. 11-33. The amended complaint alleged that both employees were victims of racial discrimination in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986, and the Fourteenth Amendment of the United States Constitution and were retaliated against for exercise of their First Amendment rights. Hedman also alleged civil rights claims based on sex discrimination. For the first time, damages were claimed against the individual defendants — $1,000,000 in compensatory damages and $450,000 in punitive damages. A. 23-33. In response to this new complaint, the State removed the entire case to the United States District Court for the District of Maryland. App. 34. At that time, already pending in District Court was a separate action (an outgrowth of the EEOC complaint) filed by Hedman against the State claiming unlawful employment discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Grattan filed

a similar, separate Title VII action shortly thereafter. App. 24.

The State agreed to consolidate the cases and moved to dismiss all three. The District Court (Judge Norman P. Ramsey), however, refused to consolidate or to dismiss the Title VII cases and these are still pending in the District Court. App. 40. However, the Court did dismiss the removed case, finding, as President Burnett had argued, A. 39, that it was untimely filed. App. 32-40. The Court reasoned that rights and remedies provided by Maryland's Human Relations Law (Article 49B) were most analogous to the asserted federal claims and thus, the limitations period most appropriate for adoption by the district court was Article 49B, § 9(a), which requires all employment discrimination complaints to be filed with the Maryland Commission on Human Relations within six months of their occurrence. App. 34-35.[6] Since the federal claims were not brought within this period they were dismissed as not timely filed. *Id.*[7]

The employees appealed and the United States Court of Appeals for the Fourth Circuit reversed. App. 16-22. *Grattan v. Burnett*, 710 F.2d 160 (4th Cir. 1983). First, relying upon *McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc.*, 698 F.2d 676, 678 (4th Cir.

[6] In so doing the District Court followed several earlier Maryland cases involving suits brought under § 1981. *See e.g., McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981). At the time, the Maryland district courts, like other courts throughout the country, were divided on the question of whether time periods specified in state fair employment practices laws should serve as limitations periods in federal civil rights action. *See Evans v. Chesapeake & Potomac Telephone Company*, 535 F. Supp. 499 (D. Md. 1982).

[7] The District Court ruled that the employees' free speech claim was governed by a three year limitations period but held it barred as well since it was not raised until 1981 and therefore did not relate back to the 1977 complaint. App. 37-39. The employees did not appeal this holding to the Fourth Circuit.

1983), the court below held the six month statute of limitations prescribed in Article 49B, § 9(a) was not applicable. App. 19. In *McNutt*, a case decided by another panel of the Fourth Circuit a few weeks prior to oral argument in this case, the court had concluded that Art. 49B §9(a) should not be applied to a private employee's claim of racial discrimination brought under 42 U.S.C. § 1981, because the "mixed scheme of administrative and judicial enforcement" in Article 49B was not analogous to a judicial action brought to enforce § 1981. 698 F.2d at 678.

In urging the Fourth Circuit to apply § 9(a) in the case at hand, the State pointed out, *inter alia*, that the present case, unlike *McNutt*, involved a public, rather than private employee and that the *McNutt* panel had expressly recognized that the policy reasons supporting prompt assertion and prompt resolution of public employee "controversies over discharges, demotions and failures to promote or transfer" were "particularly" acute. 698 F.2d at 678. Further, the State noted that the *McNutt* panel had reached its view that federal courts can only borrow state limitations periods which provide the *plaintiff* with a purely judicial remedy without reference to this Court's decision in *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981). Even though the employees offered no response to these arguments, the lower court rejected them without comment.

The court below also refused to apply other abbreviated limitations periods urged by the State — limitations periods of precisely the sort which the *McNutt* panel had indicated would be applicable in federal civil rights actions. The *McNutt* court had concluded that there was no indication that the Maryland legislature intended the six-month limitations period found in Article 49B § 9(a) to be applied to other types of judicial actions involving

private employees: "No Maryland statute specifically addresses the matter" and there is no "decision or body of decisions on the subject in Maryland." 698 F.2d at 679. However, the *McNutt* court said that if there had been such evidence of state intent, it would have applied a short limitations period: "Had there been in Maryland a decision or body of decisions on the subject . . . we would probably accept them as the common law of the State of Maryland" and apply them pursuant to 42 U.S.C. § 1988. 698 F.2d at 679.

The State argued below that in a case involving a public employee, there are both statutes and common law which do, in the words of the *McNutt* panel, "specifically address the matter." Petitioners pointed to a wide body of Maryland statutes and regulations providing public employees their own administrative and judicial forum to challenge a discharge by their public employer — all within abbreviated limitation periods, as well as an established common law of Maryland requiring a public employee to assert his employment dispute in court in an expeditious fashion. *See Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950) (five and one-half months).

The employees' only response was to argue that these statutes and case law did not apply to them because they were not merit system employees. The Fourth Circuit, however, did not reject the statutory and common law limitations periods for public employment disputes on this ground. Rather the court concentrated simply on the length of the limitations periods, noting twice in the space of two paragraphs that these periods were "even shorter" than the period rejected in *McNutt.* App. at 20. 710 F.2d at 162.[8] The Court then made its own independent and conclusory assessment of the "intent" of the Maryland

[8] The author of the Fourth Circuit opinion also suggested at oral argument that the proffered limitations periods were too short.

legislature and found that even though abbreviated limitations periods were mandated by statutes and case law governing the rights of public employees, the legislature could not have "intended" that a limitations period of this brevity be applied "to civil actions for discrimination." App. at 20. 710 F.2d at 162.[9] Accordingly, the Court held that the general limitations period of three years for actions for which no other period is specifically provided, Maryland Code, Courts & Judicial Proceedings Art. § 5-101, should be applied in "discrimination suits brought under the Civil Rights Acts by employees in public as well as private employment." App. 21. 710 F.2d at 163.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Fourth Circuit erroneously concluded that a Maryland three year statute of limitations for actions for which no other period is provided, should be applied by a federal court in a public employee's suit alleging employment discrimination brought under the Civil Rights Acts rather than the six month period which Maryland law specifically mandates for all employment discrimination complaints filed with the State Human Relations Commission.

Applicable Legal Principles

Under 42 U.S.C. § 1983 and related civil rights statutes, federal courts are generally required to borrow the statute of limitations governing the most analogous state cause of action. *Board of Regents v. Tomanio,* 446 U.S. 478 (1980). This limitations period can be disregarded only if "inconsistent with the Constitution and laws of the United

[9] The Fourth Circuit rejected the State's alternative argument that the employees' claims of race and sex discrimination first raised in their 1981 complaint did not "relate back" to the 1977 complaint and so were not timely filed even if a three year limitations period were applicable. App. 22. 710 F.2d at 163.

States." 42 U.S.C. § 1988. In determining whether a state cause of action is most analogous to a federal civil rights claim, federal courts should analyze state law, consider the posture of the federal claim and federal policies and compare the two statutes and their effects in recognition that a more specific statute of limitations is to be preferred to a general one, that principles of federalism always play a role in § 1983 actions and that there is ordinarily no reason to reject the characterization state law would impose with respect to the federal claim. *Board of Regents v. Tomanio, supra,* 446 U.S. 478; *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981); *Auto Workers v. Hoosier Cardinal Corp.,* 383 U.S. 696 (1968).

Six Months is the Limitations Period Governing the Most Analogous State Cause of Action

In the context of a public employee's civil rights claims for reinstatement and damages arising from an alleged discriminatory discharge, the federal policies involved are deterrence, compensation, *Board of Regents v. Tomanio, supra,* 446 U.S. 478, and the rapid resolution of employee disputes, particularly those involving discrimination claims of public employees. *DelCostello v. International Brotherhood of Teamsters,* 103 S. Ct. 2281 (1983); *United States ex rel. Arant v. Lane,* 249 U.S. 367 (1919); 42 U.S.C. § 2000e-5. In light of these federal policies, a Maryland court in the abstract, would analogize public employee actions under the federal civil rights laws alleging an abuse of governmental power, an unconstitutional discharge, and individual liability on the part of the perpetrators and seeking to obtain reinstatement, to a mandamus action; and, in the specific context of a discrimination claim, the analogous cause of action would be one under 49B of the Maryland Code — the specific statutory remedy that displaces the employee's mandamus action. And so the statute of limitations to be borrowed in a federal civil rights action alleging employment discrimination is that contained in Article 49B, *i.e.* Section 9. The

lower court's finding that this should not be borrowed because it governed administrative proceedings is erroneous for numerous reasons. Among them are the following: (1) the six month period mandated in § 9 is a true statute of limitations, barring state judicial as well as administrative remedies, and is part of a specific statutory scheme to deter and compensate for discrimination; (2) this Court itself has turned to time limits for administrative proceedings to supply the appropriate limitations period for federal causes of action, *DelCostello v. International Brotherhood of Teamsters, supra,* 103 S. Ct. 281, and (3) if an employee pursues his remedy under Article 49B through to a state judicial proceeding, the state court's determination will collaterally estop a subsequent § 1983 or Title VII action. *Kremer v. Chemical Const. Co.,* 456 U.S. 461 (1982); *Allen v. McCurry,* 449 U.S. 90 (1980).

Application of the Six Month Limitations Period Furthers Important State Policies

Three important state policies are furthered by applying Maryland's six month limitation period in this case: (1) the strong and long recognized public policy underlying limitations periods, *e.g. Wood v. Carpenter,* 101 U.S. 135 (1979), a policy clearly not "disfavored in federal law" in general, *Board of Regents v. Tomanio, supra,* 446 U.S. at 448, nor in civil rights actions in particular, *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 464 (1975); (2) the well established policy favoring prompt assertion and resolution of public employment disputes, *Nicholas v. United States,* 257 U.S. 71, 75 (1921); *United States, ex rel. Arant v. Lane, supra,* 249 U.S. at 372; *Duffey v. Rickard,* 194 Md. 228, 71 A.2d 41 (1950), *Annot:* Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943); and (3) the policy of affording state officers as much protection as reasonable from the countless lawsuits

brought against them. *See Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

Borrowing the Six Month Limitations Period is Entirely Consistent With Federal Law and Policies

Borrowing Maryland's six month statute of limitations advances the goals of federalism, and is in no way inconsistent with or contrary to any other federal law or policy. Deterrence and compensation, which have been recognized as the principal federal policies furthered by the Civil Rights Laws, *Board of Regents v. Tomanio, supra*, 446 U.S. at 488; *Robertson v. Wegmann*, 436 U.S. 584, 590 (1978), are not hindered by application of this statute of limitations. Nor is borrowing this limitations period contrary to *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). *See Kremer v. Chemical Const. Co., supra*, 456 U.S. 461. Finally, the limitations period is not "too short" to be applied in a federal suit; Congress has mandated equally short limitations periods to govern employee suits under Title VII, 42 U.S.C. § 2000e-5, and the National Labor Relations Act, 29 U.S.C. § 160(b), and this Court has applied limitations periods as short as this on a number of occasions. *See e.g. DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. 2281; *United Parcel Service v. Mitchell, supra*, 451 U.S. 56; *Local Lodge v. National Labor Relations Board*, 362 U.S. 411 (1960); *Wheeler v. Jackson*, 137 U.S. 245 (1890).

ARGUMENT

I.

MARYLAND'S SIX MONTH LIMITATIONS PERIOD FOR FILING EMPLOYMENT DISCRIMINATION CLAIMS IS THE MOST ANALOGOUS STATE LIMITATIONS PERIOD FOR BIAS SUITS BROUGHT BY PUBLIC EMPLOYEES UNDER 42 U.S.C. § 1983 AND RELATED CIVIL RIGHTS STATUTES.

Since Congress did not establish a statute of limitations for actions brought under 42 U.S.C. § 1983 and similar

civil rights statutes,[10] federal courts are generally required to borrow the state statute of limitations governing an analogous cause of action. *Board of Regents v. Tomanio, supra,* 446 U.S. at 484. *See also, Johnson v. Railway Express Agency, Inc., supra,* 421 U.S. at 462. The state statute of limitations for the most analogous state cause of action is the "binding rule of law" in federal civil rights actions, which can be disregarded only if "inconsistent with the Constitution and laws of the United States." *Board of Regents v. Tomanio, supra,* 446 U.S. at 484-5 and 42 U.S.C. § 1988.

Unlike a number of lower federal courts, this Court has never adopted a strict formula for determining which of two state limitations periods is applicable in a federal civil rights case or which state cause of action is most analogous to the federal claim.[11] However, this Court has

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[10] Respondents below pressed claims under 42 U.S.C. §§ 1981 and 1985(3), as well as § 1983, and all of these were dismissed as untimely by the District Court. However, for the sake of simplicity in argument, and because a federal court's approach to limitations issues under these statutes would not ordinarily be expected to vary from one statute to another under 42 U.S.C. § 1988, Petitioners will principally refer to § 1983 throughout their brief. The employees also asserted a claim under 42 U.S.C. § 1986 which has its own limitations period, but which was rejected by the District Court because "inasmuch as Section 1986 is derivative of Section 1985, where a party has failed to state a timely claim under Section 1985, there is no ground for relief under Section 1986." App. 36.

[11] The "test" in the United States Court of Appeals for the Fourth Circuit was set forth in *O'Hara v. Kovens,* 625 F.2d 15, 18 (4th Cir. 1980):

> "When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted. It is not necessary that the state statute operate in the same fashion as the federal scheme, nor is it necessary that the state statute describe a cause of action identical to the

said that the inquiry is both "heavily contingent upon an analysis of state law," *Runyon v. McCrary*, 427 U.S. 160, 181 (1976), and dependent upon "the nature of the federal claim and the federal policies involved," *United Parcel Service v. Mitchell, supra* 451 U.S. at 60-61. In essence, the district court must "characterize" the federal claim for purposes of selecting the appropriate state limitations provision, *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966), and compare it with the analogous state court action, always recognizing that the state law that more specifically addresses the federal claim is to be favored over a general limitations period, *United Parcel Service v. Mitchell, supra*, 451 U.S. at 62; that a comparison of the "effects" of the federal and state causes of action may be more fruitful than the similarity of their procedures. *Id.* at 62, n. 3; and that there is ordinarily "no reason to reject the characterization state law would impose" with respect to the federal claim, *Auto Workers v. Hoosier Cardinal Corp., supra*, 383 U.S. at 706.

What is not critical in the analysis is that the state cause of action "fits hand in glove" with the federal claim, *United Parcel Service v. Mitchell, supra*, 451 U.S. at 64, or that the state legislature "intended" its statute of limitations to be applied in the federal context, *DelCostello v. International Brotherhood of Teamsters, supra.*, 103 S. Ct. at 2293. Finally, Petitioners submit that here, in a § 1983 action begun in state court involving state

> federal cause at issue. [Citations omitted.] There simply must be a commonality of purpose between the federal right and the state statutory scheme so that it is reasonable to subject the federal implied right to the statute of limitations provided by state law."

Some other circuits have adopted an "essential nature" test for determining the limitations period for civil rights cases. *See Sullivan v. LaMunyon*, 572 F. Supp. 753, 757 (D. Kan. 1983). Under that test, district courts "are forced to examine the factual background of the civil rights claim with an eye towards divining the 'essential nature' of that claim in state law nomenclature." *Id.*

employees, "[c]onsiderations of federalism," *Board of Regents v. Tomanio, supra,* 446 U.S. at 492, should play an important role in the equation. *See also, Warren v. Norman Realty Co.,* 513 F.2d 730, 733 (8th Cir. 1975), *cert. denied* 423 U.S. 855 (1975) ("The ultimate goal is to apply the same limitations period to the federal civil rights action as would be applied if a similar action were brought in state court.").

The lower court paid little heed to these principles. Specifically, it ignored the specificity of the state's statutory remedy for employment discrimination in order to embrace a much longer general limitations statute. It erroneously emphasized certain mechanics of the 49B remedy, mischaracterizing the statute as solely "informal, investigatory and conciliatory in nature," App. 20, rather than analyzing the state scheme for its purpose and effect, particularly with respect to the role of the individual litigant. It failed to place itself in the position of a state court facing a public employee discrimination claim. And finally, while making unsubstantiated assertions about the intent of the Maryland legislature to earmark the relevant State statutes as a limitations period, it totally ignored State policy reflected both in its common law and statutes favoring prompt assertion and resolution of public employee disputes.

The first step that should have been taken below is to inquire into the nature of the federal claims asserted and the policies that are at stake. The Respondents pressed claims of reverse race discrimination under 42 U.S.C. §§ 1981, 1983, and 1985(3) asking for reinstatement to public employment and damages from the individuals they charged for their non-renewal. Hedman also pressed a sex discrimination claim. Section 1981 proscribes discrimination on the basis of race in the making or enforcement of contracts and has developed into a broad remedy for racial discrimination in employment under which a

wrongfully discharged employee can obtain reinstatement, back pay and damages. *McDonald v. Santa Fe Truck Transporation Co.*, 427 U.S. 273, 295 (1976). Section 1983 confers no rights but creates a remedy for inadequate state protection of civil rights in order to deter future abuses of power by persons acting under color of state law and to compensate the person whose rights have been violated. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981). It too provides a remedy for a discriminatory termination of a public employee who, if successful, can obtain reinstatement, back pay and damages. Section 1985(3), like § 1983, provides no substantive rights itself, but merely furnishes a remedy for violations of protected rights. *Great American Federal Savings and Loan v. Novotny*, 442 U.S. 366 (1979). Specifically, it is aimed at conspiracies motivated by racial or class-based animus for the purpose of depriving persons of equal protection of the laws or of equal privileges and immunities under the law; and it has been held to be available to a public employee seeking back pay and damages for a conspiracy to deprive that person of equal employment opportunities. *Curran v. Portland Super. School Committee Etc.*, 435 F. Supp. 1063 (D. Maine 1977).

In the context of a public employee discharge case, the policies served by these federal statutes do not exhaust the federal policy considerations that must be considered. Federal law favors "the relatively rapid final resolution of labor disputes." *DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. at 2292; *United Parcel Service v. Mitchell, supra*, 451 U.S. at 59; 29 U.S.C. § 160(b). And this is particularly true of discrimination claims against employers which under federal law must be filed within 6 months of the alleged discrimination; *see Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980) (six month limitations period specified in 42 U.S.C. § 2000e-5(e) "while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect[s]

employers from the burden of defending claims arising from employment decisions that are long past."); and of discharges challenged by public employees. *See United States ex rel. Arant v. Lane, supra*, 249 U.S. at 372, where this Court said:

> When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

See also, Nicholas v. United States, supra, 257 U.S. at 75.

In light of these federal policies and those served by the civil rights statutes, the question becomes what state court action best characterizes Respondents' discrimination claims and best serves the policies of federal law? Petitioners submit that, in the abstract, a Maryland court would analogize public employee actions under the federal civil rights laws to remedy an unconstitutional discharge, obtain reinstatement, damages and individual liability on the part of the perpetrators to a mandamus action; and that, in the specific context of a discrimination claim, the analogous cause of action would be one under 49B of the Maryland Code — the specific statutory remedy that displaces the employee's mandamus action.

In Maryland, a mandamus action is the traditional method "to correct abuses of discretion and arbitrary, illegal, capricious or unreasonable acts" by public officers and governmental agencies, *Hecht v. Crook*, 184 Md. 271, 280, 40 A.2d 673 (1944), including those impairing personal, property or constitutional rights; including violations of the Fourteenth Amendment. *See Ness v. Baltimore*, 162 Md. 529, 160 At. 8 (1932); *Heaps v. Cobb*,

supra, 185 Md. 372, 379, 45 A.2d 73. Like § 1983 and § 1985(3), it does not create rights, but merely provides a mechanism for their enforcement. *Jones v. House of Reformation*, 176 Md. 43, 3 A.2d 728 (1939). Like § 1983, it provides a specific remedy where existing State remedies are found lacking. *Compare McNeese v. Board of Education*, 373 U.S. 688 (1963) with *Harwood v. Marshall*, 9 Md. 83, 98 (1856) (Mandamus "ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one.").[12]

Since before the Civil War, mandamus has furnished a damage remedy in Maryland against erring public officials. *See* Chapter 285, Laws of 1858; Maryland Rule BE44. Just as under the federal civil rights laws, a whole body of law has arisen as to when a public officer is subject to or immune from damage liability in a mandamus action. *See* Annotation: Mandamus — Allowance of Damages, 73 ALR2d 903 at § 5 (1960).[13] And some courts even allow the recovery of attorney's fees against public officers in a successful mandamus action. *Id.* at § 4(e); cf. *Missouri P. R. Co. v. Larabee*, 234 U.S. 459 (1914). Finally, at least since 1888 Maryland courts have been able to grant injunctive relief in a mandamus proceeding. See Chapter 454, Laws of 1888; Maryland Rules BF1 et seq. In short, deterrence of abuses of power by governmental

[12] In Maryland, mandamus is no longer considered a prerogative writ. *Pressman v. Elgin*, 187 Md. 446, 451, 50 A.2d 560 (1947).

[13] In cases collected in this annotation, courts have considered the officer's good faith and motivation as well as the plain nature of the duty sought to be enforced. *Compare* 73 A.L.R.2d at § 5 *with Procunier v. Navarette*, 434 U.S. 555, 562 (1978) (Public officer is liable under 42 U.S.C. § 1983 if he acts with such disregard of the plaintiff's "clearly established constitutional rights" that his action cannot reasonably be characterized as being in good faith.).

officers and compensation for deprivation of rights is as much a part of the Maryland remedy of mandamus as it is of 42 U.S.C. § 1983.[14]

Traditionally in Maryland, mandamus has been the remedy resorted to by public officers and employees to challenge an illegal removal and to win reinstatement. *See Harwood v. Marshall, supra,* 9 Md. at 99; *Forami v. Reynolds,* 248 Md. 246, 236 A.2d 20 (1966). However, the Court of Appeals of Maryland, like this Court, *see United States ex rel. Arant v. Lane, supra,* 249 U.S. 367 and the courts of most other states, *see Annotation:* Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943), has adopted a strict, policy-based rule of laches in such cases that requires a public employee to promptly assert his rights.[15] *Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41. In the *Duffey* case, Maryland's highest court held that a discharged public employee who had delayed five and one-half months before pressing his claim for restoration to his job was prohibited by laches from bringing a mandamus action. Thus, under Maryland law, a mandamus action not only serves the policies embodied in 42 U.S.C. § 1983, but also the federal interest in the prompt resolution of public employee disputes.[16]

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[14] A different conclusion should not be drawn with respect to 42 U.S.C. § 1985(3), because under Maryland law "the basis of conspiracy as a civil action is the doing of something which would give a right of action without the conspiracy." *Damazo v. Wahby,* 259 Md. 627, 638, 270 A.2d 814 (1970).

[15] Typically, a mandamus action, like one brought under the civil rights laws is not governed by any specific limitations period. *Annotation*: Mandamus — Statute of Limitations, 155 A.L.R. 1144 (1945). However, laches will bar such actions. *See Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41.

[16] Without belaboring the point, the Petitioners note that there are additional parallels between a § 1983 action and a mandamus proceeding under Maryland law. For example, mandamus, like § 1983, *Maine v. Thiboutot,* 448 U.S. 1 (1980),

In Maryland, as in other states, a mandamus action ordinarily is not available if a litigant has a plain and fully adequate alternative remedy. *Walter v. Montgomery County*, 179 Md. 665, 22 A.2d 472 (1941). And the General Assembly of Maryland has enacted comprehensive statutory schemes conferring legal and administrative rights and remedies both for state employees contesting an illegal discharge and employees alleging that their job was terminated because of race or sex. *See supra* at 5-8. These remedies displace whatever mandamus action such employees would have had, including a damage claim; *see Gray v. Warden, supra*, 247 Md. 724, 234 A.2d 603, and they represent a considered judgment by the Maryland legislature that these provisions will fully deter illegal conduct by public employees and fully compensate the employees for any violation of their rights. However, just as a mandamus remedy is not available to a public employee who waits more than six months to bring an action, so too are those remedies forfeited if a state employee similarly sits on his or her rights. To trigger the statutory procedures for remedying discrimination in employment, a complaint must be filed with the State Human Relations Commission within six months from the occurrence of the allegedly discriminatory act. Md. Code, Article 49B, § 9(a). Similarly, state employees who raise discrimination claims under the state's merit system are under strict deadlines for the assertion of their rights. *See supra* at 7-8.

Of the two statutory remedies for state employees, the most clearly analogous to Respondent's sex and reverse race discrimination claims is Article 49B. However, the

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is a remedy for statutory as well as constitutional violations. A mandamus proceeding, including a damage claim, may be heard by a jury, *see* Md. Code, Courts and Judicial Proceedings Article, § 3-8A-02 and like § 1983, may be precluded by a comprehensive statutory remedy. *Compare Preiser v. Rodriguez*, 411 U.S. 475 (1973).

lower court rejected the analogy and the six month limitations period of § 9(a) of Article 49B because it governed administrative proceedings and because it characterized the state remedy as solely "informal, investigatory and conciliatory in nature." App. 20. Not only is this a mischaracterization of the remedies available under 49B and the individual plaintiff's role in it, but it is decidedly irrelevant that the limitations period for the most closely analogous state cause of action governs administrative proceedings.

First, it is apparent that the six month period specified is a "statute of limitations." This Court characterized the similar six month rule found in 42 U.S.C. § 2000e-5 as a limitations period both in *Zipes v. TWA*, 455 U.S. 385, 398 (1982) and in *Delaware State College v. Ricks, supra*, 449 U.S. at 256-57. Moreover, failure to comply with the deadline imposed by the Maryland statute will deprive a plaintiff not only of his or her administrative remedy but of any state judicial remedy he or she would have under Article 49B or mandamus, even if the state employee claimed that his or her discharge violated the United States Constitution. *State Department of Assessments v. Clark*, 281 Md. 385, 380 A.2d 28 (1977); *Myers v. Chief of Fire Bureau*, 237 Md. 583, 589-90, 207 A.2d 467 (1965). Thus, § 9(a) is a genuine bar to a state court discrimination action by a public employee and must be characterized as a limitations period.

Second, this Court itself has turned to time limits for administrative proceedings to fashion an appropriate limitations period for federal causes of action. In *Del Costello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. 2281, this Court, motivated in part by the federal policy of prompt resolution of employee disputes, adopted a six month period for filing unfair labor practice charges with the National Labor Relations Board as the most appropriate limitations period for an employee's suit

against an employer and a union for breach of a collective bargaining agreement and the union's duty of fair representation.[17] Similarly, in *Kansas City Southern Ry. Co. v. Wolf*, 261 U.S. 133 (1923), the Court adopted a time limit for filing complaints with the Interstate Commerce Commission as the appropriate limitations period for damage suits against common carriers for violating provisions of the Interstate Commerce Act. And in *United Parcel Service v. Mitchell, supra*, 451 U.S. at 61, n.3, the Court noted that an employee's state remedy that did not provide a direct entry to court, did "not mean" that it was not "closely analogous" to a federal remedy that did, provided that the state and federal remedies had the same effect.

Third, regardless of the characterization of proceedings under Article 49B, it is clear that if an employee alleging sex or race discrimination pursues that remedy unsuccessfully through a state judicial forum, it will have a collateral estoppel effect in both a subsequent § 1983 or Title VII action. *Kremer v. Chemical Const. Co., supra*, 456 U.S. 461; *Allen v. McCurry*, 449 U.S. 90 (1980).

Fourth, the lower court mischaracterized both Human Relations Commission proceedings and the aggrieved employee's role in them. Under Article 49B, an employee is not simply a bystander, he can join in a request for temporary injunctive relief if terminated; litigate his own case before the Commission; in many cases appeal from an administrative decision of no probable cause; go to court to defend a Commission decision in his favor or challenge one that is adverse to him.

Fifth, the Circuit Court paid no attention, as it should have, to the greater specificity of Article 49B over a

[17] The six month limitations period specified in 29 U.S.C. § 160(b) and adopted in *DelCostello* was the model for the six month limitations period of 42 U.S.C. § 2000e-5(e).

general limitations statute; to the purpose of Maryland's comprehensive statutory prohibition on discrimination in employment, *see* Md. Code, Art. 49B § 14, which is similar to the goal of a federal civil rights action for race and sex discrimination; or to the critical factor that the statute displaced the one common law action in Maryland that closely fit a § 1983 claim. Moreover, the lower court failed to note that Article 49B with its remedies of reinstatement, back-pay and affirmative action and with its unique feature of permitting state officers and employees, like petitioners, to be named respondents in a Commission proceeding and subsequent court action, Md. Code Art. 49B § 7(b)[18] are adequate to serve the goals of deterrence and compensation. *Cf. Bush v. Lucas*, 103 S. Ct. 2404 (1983).

Finally, by applying Maryland's six month limitations period for filing discrimination claims to federal civil rights actions based on termination of public employment allegedly for sex or race, a desirable side effect would be the achievement of a substantial degree of uniformity among such actions in the states. This is because so many other jurisdictions have adopted an identical deadline for filing fair employment practice claims. Petition for Certiorari at n.7.

For all of these reasons, Petitioners submit that the lower court erred in refusing to find a claim under Art. 49B to be the most closely analogous cause of action to Respondent's federal civil rights claims and in declining to adopt as applicable the six month limitations period contained in § 9(a) of Art. 49B.

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[18] The filing of a complaint with the Human Relations Commission naming an individual as a respondent would put that employee or officer on notice that personal liability was being sought against him or her — a point that was clearly not obvious from Respondents' EEOC complaint which named only Coppin State College as a Respondent.

II.

APPLICATION OF MARYLAND'S SIX MONTH LIMITATIONS PERIOD IN A FEDERAL CIVIL RIGHTS SUIT ALLEGING EMPLOYMENT DISCRIMINATION FURTHERS IMPORTANT STATE POLICIES AND IS ENTIRELY CONSISTENT WITH FEDERAL LAWS AND POLICIES.

Section 1988 permits federal courts in Civil Rights cases to disregard an "otherwise applicable" state statute of limitations, like Maryland's Article 49B, Section 9, "*only* if the state law is 'inconsistent with the Constitution and laws of the United States.'" (Emphasis added) *Board of Regents v. Tomanio, supra,* 446 U.S. at 485; *Robertson v. Wegmann, supra,* 436 U.S. at 588. In order to make this determination, "to gauge consistency," the "state and federal policies which the respective legislatures sought to foster must be identified and compared." *Board of Regents v. Tomanio, supra,* 446 U.S. at 487. When those policies are identified and compared in this case it is clear that the Maryland statute is not in any way inconsistent with "the Constitution or laws of the United States," and so should be applied.

There are three important state policies fostered by Article 49B, Section 9. First, it furthers the strong and long recognized public policy generally underlying limitations periods. *See e.g., Wood v. Carpenter, supra,* 101 U.S. at 135; Note, Developments in the Law — Statutes of Limitations, 63 Harv. L. Rev. 1177 (1950). As the Court noted in *Tomanio,* limitations periods are not "technicalities" but rather are "fundamental to a well-ordered judicial system." 446 U.S. at 487. Limitations periods not only protect defendants who have settled expectations that substantive claims cannot be asserted indefinitely but also produce more accuracy and reliability in the ultimate fact finding process, by ensuring that discovery and trial are undertaken when testimony is still relatively fresh. *Id.*

Moreover, the policy favoring limitations periods is clearly not "disfavored in federal law." 446 U.S. at 448. In many areas Congress has expressly enacted statutes of limitations to govern a federal claim and this Court has not hesitated to apply these limitations periods even while recognizing that such applications "make it impossible to enforce what were otherwise perfectly valid claims." *United States v. Kubrick*, 444 U.S. 111, 125 (1979). The importance which has been given the policy underlying limitations periods in federal law is further "attested to by the fact that when Congress" has created a substantive claim but "provided *no* statute of limitations for" that claim, this Court has directed that the most analogous limitations period be borrowed, *Board of Regents v. Tomanio, supra*, 446 U.S. at 488, and has repeatedly applied such a limitations period to bar tardily commenced proceedings. *E.g. Runyon v. McCrary, supra*, 427 U.S. at 180-81; *Johnson v. Railway Express, supra; O'Sullivan v. Felix*, 233 U.S. 318 (1914). Moreover, this Court has not only specifically rejected the idea that "there is anything peculiar to a federal civil rights action which would justify a special reluctance in applying" a state statute of limitations, but noted that "the express terms of 42 U.S.C. § 1988 suggest that the contrary is true." *Johnson v. Railway Express Agency, Inc., supra*, 421 U.S. at 464. *Accord, Board of Regents v. Tomanio, supra*, 446 U.S. at 485-491.

The second, equally significant state policy furthered by the Maryland statute is the prompt assertion and resolution of employment disputes by public employees. As indicated within, *supra* at 20-21, this is in fact also an important federal policy specifically recognized by this Court as long ago as 1919, *United States, ex rel. Arant v. Lane, supra*, 249 U.S. at 372, and as recently as last term, *DelCostello v. International Brotherhood of Teamsters, supra*, 103 S. Ct. at 2292, and by Congress in the National

Labor Relations Act, 29 U.S.C. § 160(b), and Title VII, 42 U.S.C. § 2000e-5. This policy is equally well established in state law. *See* Annot: Acquiescence or Delay as Affecting Rights of Public Employees Illegally Discharged, Suspended or Transferred, 145 A.L.R. 767 (1943) (collecting more than 100 cases on the subject — some going as far back as 1879) and *Duffey v. Rickard, supra,* 194 Md. 228, 71 A.2d 41. And its importance is clearly mirrored in the statutes and case law of recent years, *i.e.* not just Maryland,[19] but most states have specifically enacted an abbreviated period for the filing of claims of employment discrimination with the state fair employment practices agency. *See* Petition for Certiorari at n.7.

The third significant state policy furthered by application of Section 9 here is that of affording public officers some reasonable protection from the seemingly endless stream of unfounded, and often stale, lawsuits brought against them.[20] For example, here administrators at a small primarily black college determined in 1976 for what they believed to be good cause, A. 34-39, not to renew the contracts of two untenured white administrative employees. Now, more than seven years later, they are still defending this action in three federal law suits. "If management personnel face the added risk of personal

[19] It is worth noting that not only Article 49B and Article 64A but a host of other Maryland statutes require public employees to promptly assert their employment disputes. *See e.g.*, Annotated Code of Maryland, Article 27, § 721 and 734 (Law Enforcement Officers); Education Article § 6-202 (Teachers and Principals), § 13-1A-01 *et seq.* (University of Maryland Employees), § 14-110 (Board of Trustees of State Universities and Colleges Employees).

[20] The number of non-prisoner cases brought in the federal courts under the Civil Rights Acts increased from 296 in 1961 to 13,113 in 1977, *Butz v. Economou,* 438 U.S. 478, 526 (1978) to 17,038 in 1982. Annual Report of the Director of the Administrative Office of the United States Courts 216, Table C-2 (1982).

liability for decisions that they believe to be" correct, they will be deterred from "imposing discipline in future cases." *Bush v. Lucas, supra,* 103 S. Ct. at 2417. Moreover, this Court has repeatedly recognized:

> ". . . it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to the society as a whole. These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' *Gregoire v. Biddle,* 177 F.2d 579, 581 (CA2 1949), *cert. denied,* 339 U.S. 949, 70 S. Ct. 803, 94 L. Ed. 1363 (1950)."

Harlow v. Fitzgerald, supra, 457 U.S. at 814. *Compare Wood v. Strickland,* 420 U.S. 308, 319-320 (1975).

Protecting public officers from endless unreasonable and time-consuming litigation has led the Court to afford certain public officials absolute immunity from liability for damages, *Pierson v. Ray,* 386 U.S. 547 (1967); *Imbler v. Pachtman,* 424 U.S. 409 (1976); *Briscoe v. Lahue,* 103 S. Ct. 1108 (1983); to hold a trial court's denial of absolute immunity immediately appealable as a collateral order, *Nixon v. Fitzgerald,* 457 U.S. 731 (1982); to hold there is no *respondeat superior* liability under § 1983, *Polk County v. Dodson,* 457 U.S. 312 (1981); to give other officers qualified or good faith immunity, *Scheuer v. Rhodes,* 416 U.S. 232 (1974); and to direct that this qualified immunity be decided on a motion for summary judgment with discovery withheld until that threshold question is resolved, *Harlow v. Fitzgerald, supra,* 457 U.S. at 818. Fostering of this policy in the case at hand can be accomplished by a far less radical means than that found necessary in *Pierson, Imbler,* etc., *i.e.* simple application of the most analogous state limitations period.

Not only, as demonstrated above, do three strong state policies support the application of an abbreviated limitations period here, but also — and just as clearly — application of such a limitations period is in no way inconsistent with or contrary to any federal policy.[21] One federal policy which the Court has identified as "appropriate" to consider "in adjudicating federal suits based on 42 U.S.C. § 1983" is advancing the goals of federalism. *Board of Regents v. Tomanio, supra,* 446 U.S. at 492, *citing Younger v. Harris,* 401 U.S. 37 (1971). In this case begun in State court, involving State officials and State employees this policy is, as noted within, of particular concern. Only application by a federal court of the limitations period that a state court would use in a similar action — here Article 49B, § 9 — is consistent with "a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states." *Younger v. Harris, supra,* 401 U.S. at 44, 45.

Deterrence and compensation have been recognized as the principal federal policies furthered by the federal Civil

[21] It should be noted at the outset that application of Article 49B, § 9 would clearly not discriminate against a federal cause of action. *Compare Johnson v. Railway Express Agency, supra,* 421 U.S. at 462 n. 7, and cases cited therein. Similarly, while uniformity is a federal policy which sometimes necessitates the displacement of an otherwise applicable state rule of law, *e.g., Carlson v. Green,* 446 U.S. 14 (1980), it has not been held "to warrant the displacement of state statutes of limitations for civil rights actions." *Board of Regents v. Tomanio, supra,* 446 U.S. at 489; *Robertson v. Wegmann, supra,* 436 U.S. at 594, n. 11. If the Court should reconsider this holding and find uniformity necessary and/or desirable, this uniformity could be achieved by applying the state statutes similar to Article 49B § 9, *see supra* at 27, or the six month statute of limitations applicable to employment disputes under Title VII, 42 U.S.C. § 2000e-5.

Rights Laws. *Board of Regents v. Tomanio, supra,* 446 U.S. at 488; *Robertson v. Wegmann, supra,* 436 U.S. at 590. As explained within, *supra* at 22-23, the Maryland cause of action which best serves these policies is that contained in Article 49B. Borrowing the statute of limitations applicable to actions brought under Article 49B thus would seem, by definition, to be consistent with these policies. Moreover, in *Wegmann,* the Court identified three factors which it found demonstrated that application of the state rule of law in that case would be consistent with both of these policies; significantly, all three factors are also present in the case at hand.

First, as in *Wegmann,* there is no claim made that the application of the state rule of law (here, a state limitations period) is generally inconsistent with the policies of compensation or deterrence. Indeed, Respondents could hardly make this claim, since for over 70 years the Court has held to the contrary. *O'Sullivan v. Felix, supra,* 233 U.S. at 318. Secondly, it is just as clear here as it was in *Wegmann,* 436 U.S. at 591-92, that application of the state rule of law will not automatically defeat all federal civil rights claims to which that rule is applied. Rather, "neither of these policies [deterrence and compensation] is significantly affected by" application of a limitations period since "plaintiffs can still readily enforce their claims, thereby recovering compensation and fostering deterrence" simply by commencing their actions within the limitations period. *Board of Regents v. Tomanio, supra,* 446 U.S. at 488. Indeed, this Court's experience indicates that public employee discharge cases under federal civil rights laws can and often are brought very soon after discharge. *See e.g. New York Transit Authority v. Beazer,* 440 U.S. 568 (1979) (complaint filed within 4 months of discharge); *Elrod v. Burns,* 427 U.S. 347 (1976) (complaint filed within 3 months of discharge); *Perry v. Sinderman,* 408 U.S. 593 (1972) (complaint filed 16 days after contract not renewed).

The final factor which the *Wegmann* court pointed to as indicating application of a state law would not be inconsistent with federal policies was that several federal statutes took the same approach as the state statute:

> "The reasonableness of Louisiana's approach is suggested by the fact that several federal statutes providing for survival take the same approach, limiting survival to specific named relatives."

436 U.S. at 592 n. 8. The reasonableness of the six month limitations period provided in Maryland law is, of course, similarly demonstrated by the fact that federal statutes dealing with employment disputes "take the same approach", *i.e.*, provide a six month limitation period. *See, e.g.*, 42 U.S. § 2000e-5(e) (Title VII of the Civil Rights Law); 29 U.S.C. § 160(b) (National Labor Relations Act). Thus, borrowing Article 49B, § 9a in a federal Civil Rights suit is clearly not contrary to the "principal policies" this Court has identified as furthered by the Civil Rights Laws.

Perhaps recognizing this, Respondents have not even suggested that application of Maryland's abbreviated limitations period here would conflict with these policies. They do, however, maintain that this Court's holding in *Patsy v. Florida Board of Regents, supra*, 457 U.S. 496, that a § 1983 plaintiff need not exhaust state administrative remedies, somehow manifests a federal policy which "strongly militates against" the application of the Maryland statute. Brief in Opposition at 7. Specifically, Respondents allege, without any explanation, that application of a "very short administrative limitations period" is, like exhaustion of administrative remedies,[22] incon-

[22] The *Patsy* Court also noted the practical problems in requiring exhaustion of administrative remedies because of the troublesome issues of the "design and scope of an exhaustion

sistent with the three themes in the legislative history of the Civil Rights Act of 1871, *i.e.* (1) the paramount role of the federal courts in protecting civil rights, (2) the belief that state authorities have been unable or unwilling to protect these rights, and (3) the provision for dual or concurrent forums in the state or federal system. They are wrong. Application of the Maryland statutes will not diminish the paramount role of the federal courts in protecting the constitutional rights nor remove the federal courts as a forum (indeed "the" forum if the plaintiff chooses) if state courts are unable or unwilling to protect those rights; for dual and concurrent forums in the state or federal system would still exist.

Borrowing the Maryland statute clearly does not require federal plaintiffs to exhaust state remedies prior to proceeding in federal court. It only requires that they avail themselves of federal civil rights remedies sooner, rather than later. Indeed, while it is undoubtedly true, as the *Patsy* court found, that the Reconstruction Era "Congress was not presented with the question of exhaustion of administrative remedies, nor was it aware of the potential role of state administrative agencies," 457 U.S. at 496, and so could not have intended that a federal civil rights claimant exhaust state administrative remedies, no such claim can be made with regard to the application of an abbreviated state limitations period. In

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requirement." 457 U.S. at 513-14. These issues — types of claims to which exhaustion should apply, standards for deciding which procedures should be exhausted, tolling and limitations periods, *res judicata* effects, consequences for failure to comply with procedural requirements and whether to grant interim injunctive relief — are irrelevant to determining which limitations period is appropriate. The Maryland legislature has already answered the limitations question for employment discrimination claims. The policy reasons involved in determining whether an administrative process should go forward without interruption by federal courts involve factors entirely irrelevant to deciding the time within which the action must be filed.

fact, the 1866 Congress, rather than providing a limitations period for the civil rights statutes, provided in the predecessor to § 1988 that state limitations periods be borrowed in cases brought pursuant to those statutes at a time when abbreviated state limitations periods were not uncommon. *See e.g., O'Bannon v. Louisville, Cincinnati & Lexington Railroad,* 8 Bush (Ky.) 348 (1871) (suit against railroad — six months); *Adamson v. Davis,* 47 Mo. 268 (1871) (liability of stockholders to suit — one year); *Hanna v. Ingram,* 53 N.C. 55 (1862) (action for slander — six months); *Michel v. Tenney,* 6 La. Ann. 89 (1851) (action to annul probate sales — one year); 1826 N.C. Acts ch. 65, § 3 (6 months) (deriv. 1715 N.C. Laws) (amended to one year — but not until 1868); 1814 S.C. Publ. Stat. tit. 110, § 12 (Brevard) (six months) (deriv. St. 21 Ja. 1 c. 16; 1712 S.C. Acts 102) (amended to two years — but not until 1871); 1858 Tenn. Code § 2771 (six months) (deriv. 1715 Tenn. Acts ch. 27, § 5) (current version codified at Tenn. Code. Ann. § 28-3-102 — still six months).[23]

As this Court's decisions in *Allen v. McCurry, supra,* 449 U.S. at 98-99 and *Kremer v. Chemical Const. Co., supra,* 456 U.S. 461, make clear, the "policy" evidenced by the *Patsy* holding, while important, is, in fact, no broader than the holding itself, *i.e.,* a § 1983 plaintiff need not exhaust state remedies prior to bringing suit in federal court. The *Patsy* holding, mandated as it is by concerns that a plaintiff not be required to exhaust remedies in one forum

[23] *See also* decisions that upheld savings provisions significantly shortening the period for bringing claims not already barred, *Bigelow v. Bemis,* 2 Allen (Mass.) 496 (1861) (claims against decedent's estate — under six months); *State use of Isaac v. Jones,* 21 Md. 432 (1863) (action on constable's bond — less than one year); *DeMoss v. Newton,* 31 Ind. 219 (1869) (action for partition — 90 days); *George v. Gardner,* 49 Ga. 441 (1873) (all actions on contracts — nine and a half months); *Archambau v. Green,* 21 Minn. 520 (1875) (foreclosure of mortgage — six months); *Terry v. Anderson,* 95 U.S. 628 (1877) (actions against insolvent banks — nine and a half months).

prior to entrance to another, is more relevant to preclusion of federal remedies by state action than it is to the application of the appropriate state law rule in federal courts. Yet, in *Allen v. McCurry, supra*, the Court recognized the applicability of the same legislative history of the 1871 Act relied upon in *Patsy*, ("one strong motive" behind the enactment of § 1983 was "the grave congressional concern that the state courts had been deficient in protecting federal rights,") and nonetheless held a § 1983 action was precluded by a prior state court judgment. This holding was reaffirmed within weeks of *Patsy* in *Kremer v. Chemical Const. Corp., supra*, 456 U.S. 461, where the Court barred a Title VII claim following a state court affirmance — without a de novo judicial hearing — of an administrative proceeding. Surely, if a decision by the Maryland Human Relations Commission affirmed by a State court would be entitled to *res judicata* effect, then borrowing the limitations period from the Human Relations Commission is permissible.

Moreover, the "policy" which Respondents seek to find in *Patsy* — refusal by a federal court to borrow a state rule of law in a § 1983 case when application of that rule would deprive the plaintiff of a federal remedy — has, of course, been twice rejected by this Court. In both *Tomanio* and *Wegmann*, it was held that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look at state law, for the appropriate rule would then always be the one favoring the plaintiff and its source would be essentially irrelevant." *Board of Regents v. Tomanio, supra*, 446 U.S. at 488; *Robertson v. Wegman, supra*, 436 U.S. at 593.

Finally there is no reason why the Maryland statute should not be applied to federal civil rights actions simply because it provides for an abbreviated limitations period.

The holding of the court below that six months was an "inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court," App. 20, *see McNutt v. Duke Precision & Orthodontic Laboratories, Inc., supra,* 698 F.2d at 678-79, ignores the liberal pleading, amendment and "relation back" procedures mandated by the Federal Rules of Procedure. *Compare Burns v. Sullivan,* 619 F.2d 99, 106 (1st Cir.), *cert. denied,* 449 U.S. 893 (1980) ("Although it may take more than six months to properly prepare a civil rights case, a complaint meeting the requirement of Federal Rule of Civil Procedure 8(a) can surely be filed in that time. And amendments to the complaint and supplemental pleadings may be sought after suit is brought. Fed. R. Civ. P. 15.").

The lower court's disregard of the liberality allowed by the federal rules in concluding six months is "too short" is ironic because this case presents a paradigmatic example of plaintiffs' use (and arguably misuse) of this liberality to the fullest possible extent. When the Respondents filed their original complaint in February of 1977, they asserted only two claims: (1) non-renewal of their employment contracts in June of 1976 violated *state law* and their rights to procedural due process and (2) that in 1975 and 1976 the Petitioners obstructed "the other [non-black] race recruitment that had been advanced" by Respondents. A. 8. No claim was made of acts of race or sex discrimination. The principal relief requested was back pay; no claim for damages was made. A. 10. When, more than four (4) years later, Respondents amended their complaint, they alleged — for the first time — that they were the victims of sex and/or reverse race discrimination, detailing a panoply of incidents involving work assignments and pay never even alluded to in the 1977 complaint, occurring prior to 1975 for the most part; and now asserted that they were bringing suit pursuant to 42 U.S.C. § 1981, 1983, 1985, 1986, the First Amendment and

Title VII. A. 11-34. They now sought compensatory damages ($1,000,000) and punitive damages ($400,000). A. 23, 25, 28 and 31. Although the State argued to the contrary, the court below, in light of the liberal amendment and "relation back" permitted by Rule 15, *see Foman v. Davis*, 371 U.S. 178, 182 (1962); *United States v. Hougham*, 364 U.S. 310, 316-17 (1960), could only conclude that the "amended" 1981 complaint "related back" to 1977. However, to simultaneously suggest, as the lower court did, that a six months limitations period is "too short," defies logic.

Furthermore, the intimation that six months is "too short" is contrary to all authority. Congress has mandated an equally "short" limitations period to govern employees seeking relief under Title VII, 42 U.S.C. § 2000e-5, and the National Labor Relations Act, 29 U.S.C. § 160(b). Moreover, this Court has on any number of occasions applied limitations periods as short as that in the Maryland statute. *See, e.g., Local Lodge v. National Labor Relations Board, supra*, 362 U.S. 411 (6 months); *Wheeler v. Jackson, supra*, 137 U.S. 245 (6 months); *Arnson v. Murphy*, 109 U.S. 238 (1883) (90 days); *Tennessee v. Sneed*, 96 U.S. 69 (1877) (30 days was found to be a "wise and reasonable precaution for the security of the government"). Frequently, such "short" limitations periods have been specifically preferred to longer ones. *See e.g., United Parcel Service v. Mitchell, supra* (90 day limitations period applied in preference to a 6 year period); *Turner v. New York*, 168 U.S. 90 (1897) (6 months limitations period applied in preference to 2 year period). *See also, Johnson v. Railway Express Agency, Inc., supra* (one year limitations period applied in preference to six or ten year period); *Rodrigue v. Aetna Casualty and Surety Co.*, 395 U.S. 352 (1969) (one year limitations period applied in preference to three year period); *Canadian Northern Ry. Co. v. Eggen*, 252 U.S. 553 (1920) (one year limitations period applied in preference to six year period); *O'Sullivan*

v. Felix, supra, 233 U.S. 318 (one year limitations period applied in preference to five year period). Indeed, just last term, the Court rejected a three year statute of limitations period choosing instead to apply a six month limitations period to govern disputes between an employee and his union. *DelCostello v. International Brotherhood of Teamsters, supra,* 103 S. Ct. 2281.

Nor does the fact that this case is brought pursuant to federal civil rights laws, 42 U.S.C. §§ 1981, 1983, 1985, and 1986, somehow make it a special situation in which a six month limitations period is "too short." Quite the contrary. For Congress specifically provided that the decision as to the applicable statute of limitations in such civil rights cases is governed by 42 U.S.C. § 1988. When in 1866 Congress first enacted § 1988, providing therein that the "common law, as modified and changed by the constitution and statutes" of the states should govern civil rights actions, abbreviated state limitations periods were hardly unknown. *See supra* at 36. Surely, if Congress had been concerned that application of short limitations periods to federal civil rights claims would subvert the purposes of the civil rights laws it would have provided otherwise in § 1988. Thus, there is absolutely no authority for the proposition that the Maryland statute cannot be applied simply because it is "too short."

In sum, three important state policies will be furthered by Section 9's application in this case and its application is entirely consistent with the Constitution and laws of the United States.

CONCLUSION

The Petitioners do not here contend that a six month limitations period would necessarily be appropriate in every civil rights action, or even in discrimination actions involving private employees, or that another characterization might be made of a 42 U.S.C. § 1983 claim if different rights were at stake or facts at issue.[24] However, long standing state and federal policies justify a reasonable abbreviated limitations period in civil rights actions challenging the discriminatory discharge of a public employee. For these reasons and those set forth above, the lower court erred when it declined to follow Maryland's six month limitations period for discrimination claims and its judgment should be reversed.

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[24] A much longer limitations period might be appropriate in civil rights actions based upon other kinds of constitutional violations. For example, Maryland once had an express three year statute of limitations for violations of certain State constitutional provisions that protect against physical invasion of personal and liberty interests. *See* Md. Code (1972 Repl. Vol.), Art. 57, § 1.

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No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER: AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATUTES AND REGULATIONS..... 2

STATEMENT OF THE CASE..... 2

SUMMARY OF ARGUMENT..... 3

ARGUMENT:

I. The Fourth Circuit Correctly Determined That Maryland's Residuary Statute Is Applicable to Respondents' Section 1981 Claims..... 5

A. The Administrative Procedure Established by Article 49B is not Anologous to Civil Rights Claims Under 42 U.S.C. § 1981..... 8

B. The Statutory Scheme for Internal Grievances Governed by Article 64A Is Not Analogous to an Action Under 42 U.S.C. §1981..... 26

II. The Maryland Residuary Statute Is Fully Consistent With The Constitution And The Laws Of The United States..... 28

A. Resort to a Six-Month Limitations Period Contravenes the Remedial Purpose of Federal Civil Rights Actions and Unduly Restricts Their Reach..... 30

B. Application of Maryland's Residuary Statute Preserves State Policies Favoring Timely Resolution of Employment Disputes and Affording Protection from Unfounded Lawsuits..... 42

III. Even if Article 49B, § 9(a), Is the Most Analogous Statute of Limitations, the Court Should Nevertheless Affirm the Decision of the Court Below..... 55

CONCLUSION..... 58

TABLE OF CITATIONS

Banach v. State Commission on Human Relations, 277 Md. 502, 356 A.2d 242 (1976)..... 10, 11, 14, 22

Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir.), vacated and remanded on other grounds, 434 U.S. 158 (1975)..... 14

Board of Regents of University of New York v. Tomanio, 446 U.S. 478 (1980)..... 6, 30

Burns v. Sullivan, 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980)..... passim

Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976)..... 19, 54

Chevron Oil Company v. Hudson, 404 U.S. 97 (1971)..... 57

Childers v. Independent School District, 676 F.2d 1338 (10th Cir. 1982)..... 34

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)..... 16, 36

Crown, Cork & Seal Co., Inc. v. Parker, ___ U.S. ___, 103 S.Ct. 2392 (1983)..... 43

Davidson v. Koerber, 454 F. Supp. 1256 (D. Md. 1978)..... 23, 24

Delaware State College v. Ricks, 449 U.S. 250 (1980)..... 28, 33

DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281 (1983).. passim

Duffey v. Rickard, 194 Md. 228, 71 A.2d 41 (1950)..... 22

Equitable Trust v. State of Maryland Commission on Human Relations, 42 Md. App. 53, 399 A.2d 980 (1979) reversed on other grounds, 287 Md. 80, 411 A.2d 86 (1980)..... 10

Fields v. Village of Skokie, 502 F. Supp. 456 (N.D. Ill. 1980).... 14

Grattan v. Burnett, 710 F.2d 10 (4th Cir. 1983)..... 50

Hall v. Asher, 355 F. Supp. 808 (D. Md. 1973)..... 56

Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (Md. App. 1978)..... 51

Harlow v. Fitzgerald, 457 U.S. 800 (1982)..... 52

Harper v. Mayor and City Council of Baltimore, 359 F. Supp. 1187 (D. Md.) modified sub nom Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973)..... 56

Humphry v. Moore, 375 U.S. 335 (1964)..... 31

International Woodworkers, Local 534 v. Chesapeake Bay Plywood Corp., 659 F.2d 1259 (4th Cir. 1981)..... 57

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975)..... 6, 29, 31, 46

Knoll v. Springfield Township School District, 699 F.2d 137 (3d Cir. 1983), cert. pending.... 34, 35, 51

Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949 (D. Md. 1977)... 56

Lewis v. Clark, 534 F. Supp. 714 (D. Md. 1982)..... 24

Linder v. Litton Systems, Inc., 81 F.R.D. 14 (D. Md. 1978)..... 56

Mason v. Owens-Ilinois, Inc., 517 F.2d 520 (6th Cir. 1975)..... 21

McAilister v. Magnolia Petroleum Co., 357 U.S. 221 (1958)..... 32

McIver v. Russell, 264 F. Supp. 22 (D. Md. 1967)..... 56

McGill v. General Electric Co., 524 F. Supp. 1126 (D. Md. 1981), reversed in part, 685 F.2d 430 (4th Cir. 1982)..... 54

McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983)..... passim

Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894 (3rd Cir. 1977)..... 36, 43, 45

Occidental Life Insurance Company v. Equal Employment Opportunity Commission, 432 U.S. 355 (1977).. passim

Owen v. City of Independence, 445 U.S. 622 (1980)..... 37

Parish v. Maryland and Virginia Milk Producers Assn., 437 F. Supp. 623 (D. Md. 1977)..... 24, 56

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982)..... 28

Pauk v. Board of Trustees of City University of New York, 654 F.2d 856 (2d Cir. 1981) cert. denied, 455 U.S. 1000 (1982)..... passim

Picariello v. Fenton, 491 F. Supp. 1020 (M.D. Pa. 1982)..... 37

Robertson v. Wegmann, 436 U.S. 584 (1978)..... 6, 7, 28, 32

Runyon v. McCrary, 427 U.S. 160 (1976)..... 31

Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977)..... 34

Soley v. State Commission on Human Relations, 277 Md. 521, 356 A.2d 254 (1976)..... 13

Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)..... 40

UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)..... 30, 42, 47, 55

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981)..... 39, 41 42

Ware v. Colonial Provision Co., Inc., 458 F. Supp. 1193 (D. Mass. 1978)..... 54

Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975)..... 54

Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 449 U.S. 911 (1970)..... 17

Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978)..... 21

Constitutional Provisions, Statutes Rules and Regulations

United States Code:

28 U.S.C.

§ 1346(b)..... 37

§ 2680(h)..... 37

42 U.S.C.

§ 1981..... passim

§ 1983..... passim

§ 1985..... 25

§ 1988..... 6, 30

§ 2000e-5..... passim

Maryland Administrative Procedure Act:

Article 41..... 2, 13, 14

§ 244..... 13

§ 255(a)..... 2, 14

Massachusetts General Laws Annotated:

Chapter 151B, § 6..... 25

Miscellaneous

Address on State of the Judiciary by Warren E. Burger, Chief Justice of the United States to the ABA, February 12, 1984..... 36

Federal Rules of Civil Procedure:

Rule 8..... 17

Rule 11..... 15, 17

Rule 12..... 17

Rule 15..... 35

Annotated Code of Maryland:

Article 16

§ 5C..... 45

Article 27

§ 230A..... 45

Article 49B..... passim

§ 9(a)..... 9, 55, 58

§ 10..... 9, 13, 19

§ 11..... 2, 9, 11, 12

§ 12..... 9

Article 64A..... passim

§ 53..... 2, 27

§ 54..... 27

Article 100

§ 55D..... 45, 51

Article 101

§58..... 45

Courts & Judicial Proceedings Article:

§ 3-904(g)..... 45

§ 5-101..... passim

§ 5-106(g)..... 45

§ 5-106(h)..... 45

§ 5-111..... 45

Code of Maryland Regulations:

COMAR 14.03.01.02.F(1)..... 2, 10

COMAR 14.03.01.03.A..... 2, 10

COMAR 14.03.01.07.H(1)..... 2, 12

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STATUTES AND REGULATIONS

With the exception of the statutes identified below, which are set forth at Appendix A-1 through A-25, Petitioners' Brief and Petition for Certiorari identify the statutory provisions discussed in Respondents' Brief:

ARTICLE 41, ANNOTATED CODE OF MARYLAND, § 255

ARTICLE 49B, ANNOTATED CODE OF MARYLAND, § 11

ARTICLE 64A, ANNOTATED CODE OF MARYLAND, § 53

CODE OF MARYLAND REGULATIONS (COMAR) 14.03.01.02, 14.03.01.03 and 14.03.01.07

STATEMENT OF THE CASE

Petitioners have presented the facts of the case in their Brief and Petition for Certiorari. For the purposes of this Brief, Respondents accept the facts, but

not the arguments, contained in those presentations.

SUMMARY OF ARGUMENT

I. The Fourth Circuit correctly applied the limitations period identified in Courts Article, § 5-101. Petitioners' characterization of Article 49B and Article 64A as the most nearly analogous proceedings to a civil rights claim in federal court ignores the differences in the statutory schemes established by those statutes. The analogy also distorts the purpose underlying the limitations periods applied to those procedures. Petitioners focus only on the time in which a complainant must file a grievance with an agency designed to assist aggrieved persons in formulating

their complaint, explore possibilities for settlement or conciliation and, if such conciliation is unavailing, draft a formal complaint. The Maryland legislature accorded the administrative agency three years to complete that process. A similar period of time should be allotted to complainants filing formal complaints in federal court.

II. The three-year limitations period is also consistent with state and federal interests. The three-year period enhances the possibility for settlement and thereby encourages prompt resolution of disputes. It fosters the federal goals of deterrence and compensation without displacing the state system for resolving employment discrimination disputes. The three-year period no less

than the six-month period provides a time certain in which claims must be brought and thus protects potential defendants from unending litigation over stale claims. Finally, the three-year period, unlike the six-month period, is consistent with principles of federalism because it does not frustrate the interests of one forum in favor of the interests another.

ARGUMENT

I. THE FOURTH CIRCUIT CORRECTLY DETERMINED THAT MARYLAND'S RESIDUARY STATUTE IS APPLICABLE TO RESPONDENTS' SECTION 1981 CLAIMS

It is well established that an action arising under the federal civil rights laws (42 U.S.C. §§ 1981 et seq.) is governed by the statute of limitations that applies to the analogous state cause

of action.1/ The authority to borrow a state statute of limitations is not boundless, however. Congress has instructed the courts to extend the law of the state only "so far as the same is not inconsistent with the Constitution and the laws of the United States." 42 U.S.C. § 1988. See also Board of Regents of University of New York v. Tomanio, 446 U.S. 478, 483-85 (1980); Robertson v. Wegmann, 436 U.S. 584, 590 (1978); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975).

1/ In determining the appropriate statute of limitations, it is unnecessary to distinguish between the different causes of action embodied in the Reconstruction civil rights statutes. See also Pet. Br. at 17 n.10.

Selection of the appropriate limitations period requires identification of the state substantive statute most closely analogous to the federal action, a matter decided according to federal law. Robertson v. Wegmann, 436 U.S. at 590. During the course of these proceedings, Petitioners have identified at least six analogous state statutes. At present, Petitioners have narrowed their focus to two statutes: Article 49B, providing access to Maryland's Commission on Human Relations ("MCHR"); and Article 64A, enacting a state employee grievance procedure. Neither procedure is sufficiently analogous to a claim brought in court alleging violations of the federal civil rights laws. The Court of Appeals thus correctly adopted the statute of

limitations most closely analogous to proceedings brought under 42 U.S.C. § 1981 -- Maryland's residuary statute, Courts Article, § 5-101.

A. The Administrative Procedure Established By Article 49B Is Not Analogous To Civil Rights Claims Under 42 U.S.C. § 1981

Article 49B is not analogous to § 1981; it is Maryland's counterpart to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. Like Title VII, Article 49B establishes "an integrated multistep enforcement procedure" which, after conciliation efforts, substantial investigation and an evidentiary hearing, culminates in the MCHR's authority to issue judicially enforceable cease and desist orders. See Occidental Life Insurance Co. v. EEOC,

432 U.S. 355, 359 (1977); Art. 49B, §§ 10, 11 and 12. And like Title VII, under the administrative regulations of the MCHR, an employee must file a grievance within six months of an alleged discriminatory practice. Art. 49B, § 9(a). That "complaint" triggers an investigative process, not litigation.2/ Within 120 days, the MCHR must serve a copy of the administrative complaint on the

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2/ See Pet. Br. at 16. Petitioners mischaracterize the six-month limitations period in Title VII for filing administrative grievances as the time in which an action must be brought to court. It is not. In Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 366 (1977), this Court specifically held that there is no time limitation upon the EEOC's power to file suit.

respondent. COMAR 14.03.01.02.F(1).3/ The MCHR then has at least two years to investigate the grievance and to attempt to reach conciliation. COMAR 14.03.01.-03.A.4/ If the MCHR staff finds there is

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3/ The Maryland Court of Appeals has recognized that this administrative complaint, served pursuant to COMAR 14.03.01.02.F(1), is not required to conform to the more exacting pleading requirements applicable to judicial proceedings. Banach v. State Commission of Human Relations, 277 Md. 502, 513 (1976); Equitable Trust v. State of Maryland Commission on Human Relations, 42 Md. App. 53, 60-62, 399 A.2d 908 (1979), reversed on other grounds, 287 Md. 80, 411 A.2d 86 (1980).

4/ The two-year period may be extended if the respondent delays the investigation or if, upon a motion to dismiss the complaint, the Executive Director of the MCHR finds that respondent has not been unduly prejudiced by the failure to complete an investigation within two years. COMAR 14.03.01.03.A.

there is probable cause to believe the respondent has committed a discriminatory employment practice -- and it has been unsuccessful in conciliatory efforts -- the MCHR may bring formal charges against the respondent. At this point, the respondent is put on notice of the claims in a complaint which details the particulars of the charges against it. Banach v. State Commission on Human Relations, 277 Md. 502, 513, 356 A.2d 242 (1976). The respondent must then answer the complaint and defend itself at a formal evidentiary hearing. Art. 49B, § 11. The administrative procedure set forth in Article 49B thus contemplates nearly three years (assuming no extensions of time) of investigation and conciliation

before the adjudicatory stage of the process begins.

The analogy Petitioners draw between the state administrative process and the federal judicial scheme ignores the fundamental and practical differences in the role the complainant plays. Contrary to Petitioners' assertion, under Article 49B, the complainant initiates the administrative process merely by filing a grievance.5/ See McNutt v. Duke

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5/ Petitioners blatantly mischaracterize the employee's role in the administrative scheme. Pet. Br. at 26. Although COMAR 14.03.01.07.H(1) permits a complainant to be present and represented by counsel for examination and cross-examination of witnesses and to introduce evidence at a formal MCHR hearing, the general counsel of MCHR presents the employee's case. Art. 49B, § 11(a). The

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Precision Dental & Orthodontic Laboratories, Inc., 698 F.2d 676, 678 (4th Cir. 1983). He or she need not be schooled in

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5/ (Footnote continued from previous page.)

employee does not control the theory of the case or the development of evidence. Nor can an employee compel a probable cause finding (the prerequisite for a formal hearing) under Article 49B, § 10. Further, an employee ordinarily has no right to appeal a denial of a request for reconsideration upon a finding of no probable cause because in most employment discrimination cases, including this one, the EEOC has subject matter jurisdiction over such complaints. Art. 49B, § 10(d). In addition, the only judicial review of an adverse final agency decision available to an employee is the appellate review mandated by the Maryland Administrative Procedure Act, Art. 41, § 244 et seq.; Soley v. State Commission on Human Relations, 277 Md. 521, 356 A.2d 254, 257 (1976). If the final Commission decision were in favor of the employee, he would have only a discretionary right to intervene in judicial

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the law. Nor is the respondent expected to answer the complainant's grievance. Banach, supra, 277 Md. at 514-515. It is only at the end of the administrative process that the MCHR has made reasonable inquiry, and can issue a complaint well

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proceedings. Art. 41, § 255(a). Finally, Petitioners cite no authority for their assertion that an employee can join in a request for temporary injunctive relief if terminated. The case law under § 706(f)(2) of Title VII is divided on the point. Compare, for example, Berg v. Richmond Unified School District, 528 F.2d 1208 (9th Cir.), vacated and remanded on other grounds, 434 U.S. 158 (1975), with, Fields v. Village of Skokie, 502 F. Supp. 456 at 459 (N.D. Ill. 1980). There is less reason to imply such a private right of action in the Article 49B context than in a Title VII case, because unlike Title VII, there is no general private right of action under Article 49B.

grounded in fact, and based on its reasonable belief or information that a violation has occurred. Cf. Rule 11, Fed. R. Civ. P. It is only at the end of the administrative process that a formal MCHR complaint which accords with the traditional notions of fair play and notice will issue.

In contrast, to initiate suit under § 1981, the federal rules require that a complaint giving notice to the defendant issue at the beginning of the judicial process. The federal rules contemplate that before a pleading is filed, the complainant make reasonable inquiry and that the complaint be well grounded in fact and based on the party's best information and belief. Rule 11, Fed. R. Civ. P. Indeed, penalties may be imposed

against litigants who pursue poorly researched or frivolous claims. See Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978). Thus the judicial scheme makes significant demands upon complainants before they come to Court.

More appropriately, the analogy should be drawn between the complainant's role in bringing a suit under § 1981 and the MCHR's role under § 49B. In the § 1981 action, the employee cannot simply file a grievance comparable to that in the administrative scheme. He or she, like the MCHR, must recognize a deprivation, investigate and assess the merits of the claim, flesh out the particulars and draft a formal notice of the allegations that comports with the federal

rules of civil procedure. See Rules 8, 11 and 12, Fed. R. Civ. P. Unlike the MCHR, however, an employee filing a federal claim must overcome the psychological or emotional hardship of having been discharged, perhaps find new employment and, if he or she desires a lawyer, have the time and the means to retain one. The § 1981 complainant, therefore, should have at least the three years granted the MCHR to prepare his or her case.

Federal courts comparing administrative proceedings similar to Article 49B and judicial proceedings have roundly rejected any analogy between the two proceedings. For example, in Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir.), cert. denied, 449 U.S. 911 (1970),

the court declined to analogize the Illinois Fair Labor Practices Act (FEPA) procedures to § 1981 in selecting a statute of limitations to apply to the federal action. Unlike § 1981, and like Article 49B, the FEPA placed the entire burden of investigating and developing a case upon the State Commission, relieving the complainant there, as here, of the time-consuming and costly tasks of investigation and preparation of a claim. 427 F.2d at 488. Moreover, the Seventh Circuit reasoned, as did the Fourth Circuit below,6/ that the primary purpose served

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6/ In McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc., 698 F.2d 676, 678-79 (4th Cir. 1983), the court found significant to its decision that

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by the administrative process was to encourage conciliation and private settlement. Id. In contrast, the court concluded that where judicial relief is sought, "conciliation has generally failed." Id.

The Eighth Circuit reasoned similarly reasoning in Chambers v. Omaha Public School District, 536 F.2d 222, 225-27 (8th Cir. 1976). In that case, the

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Article 49B, § 10(b) specifically provides that the administrative proceeding is designed to "eliminate the discrimination by conference, conciliation, and persuasion." As such, the court ruled that the statutory mechanism could not be analogous to § 1981 in which there is no conciliation scheme or purpose. Id. The court below relied on its decision in McNutt and adopted the reasoning of that case.

court found that the state administrative procedures were not analogous to federal judicial schemes raising and resolving fair housing claims. The court distinguished the fair housing statute which governed judicial actions from the fair employment rule which applied to the time within which to initiate administrative claims. Id. at 226. Although providing identical time periods, the rules of limitations governed statutory schemes endowed with different purposes and operating mechanisms. Id. The Eighth Circuit declined to analogize the different administrative and judicial schemes. Instead, it applied Nebraska's statute of limitations for actions asserting liability under a federal statute -- a three-year limitations period. Id. at 228.

Accord: Mason v. Owens-Illinois, Inc., 517 F.2d 520, 522 (6th Cir. 1975); Zuniga v. AMFAC Foods, Inc., 580 F.2d 380, 384 n.5 (10th Cir. 1978).

Even Petitioners' own analysis leads to the conclusion that the judicial scheme of § 1981 and the administrative mechanism of Article 49B are far from analogous. Petitioners urge adoption of the state statute of limitations that state courts of Maryland would apply to federal civil rights actions had the claims been brought in state court. Pet. Br. at 17-19. 7/ They argue that the

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7/ The petitioners contend that adoption of the limitations period governing the state administrative procedures of

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precursor to Article 49B, an action for mandamus, would afford a comparable remedy. Pet. Br. at 21-24. 8/ Yet this ignores Petitioners' own recognition that mandamus is no longer available. Br. at

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Art. 49B would "advanc[e] the goals of federalism." Pet. Br. at 32. To the contrary, no better example of federalism can be imagined than abiding by the judgment of the highest court of Maryland, as the Fourth Circuit has done below and in McNutt, in finding that the procedures embodied in Art. 49B § 9(a) are largely administrative in nature. See Banach, 277 Md. at 514-15, 356 A.2d at 250-51.

8/ Petitioners' reliance on Duffey v. Rickard, 194 Md. 228, 71 A.2d 41 (1950) is similarly misplaced. Apart from the significant factual distinctions that can be made, Duffey was a laches case wholly inapposite to the statute of limitations choice facing this Court. No universal rule limiting public employee discharge actions was announced in that opinion.

7. The relief authorized by the federal civil rights statutes is largely legal, not equitable in nature. An action for mandamus is not analogous to a § 1983 action. See Pauk v. Board of Trustees of the City University of New York, 654 F.2d 856, 863 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982). Were Respondents to have brought suit in state court, the analogous proceeding at the state level would be a cause of action under the Maryland Declaration of Rights. In Davidson v. Koerber, 454 F. Supp. 1256 (D. Md. 1978), the court analyzed precisely this question and determined that under such circumstances a civil action under the Maryland Declaration of Rights would be subject to the limitations

period specified in § 5-101. As the court noted:

> This conclusion is compelled by . . . the purpose of the 1974 Code Revision. In that Revision, a "blanket three-year provision" was substituted for the former statute's "'laundry list' of actions" because many of the actions are obscure, because some state statutory actions might not be provided for, and because the general three year provision in the former statute was intended to cover "all causes of actions" subject to certain exceptions and needed updating for some modern common law torts. Md. Cts. & Jud. Proc. Code Ann. § 5-101, Revisor's Note (1974). Although Revisor's Notes are not law, . . . they are strong and persuasive evidence of the legislative intent.

454 F. Supp. at 1260. Accord: Lewis v. Clark, 534 F. Supp. 714, 717 (D. Md. 1982); Parish v. Maryland & Virginia Milk Producers Assn., 437 F. Supp. 623 (D. Md. 1977).

The holdings of the First Circuit do not diminish the fundamental dissimilarity of judicial and administrative schemes. For example, in Burns v. Sullivan, 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980), the court was asked to select the limitations period to govern actions brought pursuant to §§ 1983 and 1985 of the Civil Rights Act of 1870. Although the court selected a statute which governed administrative proceedings, the statute selected also provided for judicial action by the employee. See Mass. Gen. Laws. Ann., ch. 151B, § 6; Burns, 619 F.2d at 103. The statute selected by the Burns Court appropriately governs state judicial proceedings.

B. The Statutory Scheme For Internal Grievances Governed by Article 64A Is Not Analogous To An Action Under 42 U.S.C. § 198 § 1981

In their Petition for Writ of Certiorari, Petitioners argue that Md. Code, Art. 64A is also analogous to suits brought under § 1981. Cert. Pet. at 9, 13. By that argument, Petitioners advocate at least three separate statutes of limitations for § 1981 depending on whether the complainant was a public or private employee or an employee at all.

Article 64A, the scheme governing internal grievances for state employees, is not analogous to § 1981. The scheme established in Article 64A more aptly can be described as establishing a schedule for processing a grievance rather than a limitations period for filing the

grievance. Most of the time limits contained in the merit system grievance procedures are not limitations upon the employee. Rather, they are limitations on the state's ability to delay the processing of a grievance. See, e.g., Art. 64A, § 53. Similar limitations upon the employer's ability to delay processing a grievance are contained in Art. 64A, § 54.9/

9/ Moreover, the state statutory scheme for challenging the illegal discharge of public classified employees is wholly irrelevant to a determination of the most analogous state statute of limitations in this case because these mechanisms were simply unavailable to Respondents. Article 64A, § 53(c)(13), Anno. Code of Md., clearly excepts Respondents from the state employee grievance procedure. Petitioners have conceded this point. Pet. Br. at 8, 12. It would be anamolous

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II. THE MARYLAND RESIDUARY STATUTE IS FULLY CONSISTENT WITH THE CONSTITUTION AND THE LAWS OF THE UNITED STATES

Any assessment of the consistency of the federal action and the state timeliness rule must consider whether the state law would undermine the purposes for which the federal action exists. Robertson v. Wegmann, 436 U.S. 584, 590

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indeed if the assertion of federally guaranteed rights turned upon time limitations under a state statutory scheme which was not even available under state law to the two Respondents in this case or to private employees. See Delaware State College v. Ricks, 449 U.S. 250 (1980). This Court has made clear that federal courts -- not state administrative agencies -- have the pre-eminent role in enforcing federal rights under § 1983. Patsy v. Board of Regents of Florida, 457 U.S. 496 (1982).

(1978); Johnson v. Railway Express Agency, Inc., 421 U.S. at 465. Resort to state law to govern the timing of federal actions should be the rule in the first instance where Congress has failed to furnish a limitations period. DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 103 S.Ct. 2281, 2294. Where no state law evinces consistency with the policies underlying the federal action and where strong federal interests apply, this Court has looked to federal law for guidance. See DelCostello, 103 S.Ct. at 2293-94; Occidental Life Insurance Co. v. EEOC, 423 U.S. 355, 367 (1977).

Faced with the dissimilarity of judicial and administrative schemes and the

inapplicability of state grievance procedures to the case at bar, the Court's attention must focus on whether adoption of Maryland's residuary statute, governing civil actions, would be consistent with the laws of the United States and the Constitution. 42 U.S.C. § 1988; DelCostello, 103 S.Ct. at 2291-92 (1983); Auto Workers v. Hoosier Corp., 383 U.S. 696, 706-07 (1966).

A. Resort to a Six-Month Limitations Period Contravenes the Remedial Purpose of Federal Civil Rights Actions and Unduly Restricts Their Reach

It is beyond dispute that § 1981, like the other federal civil rights laws, was passed to achieve broad remedial purposes through compensation of victims of discrimination and deterrence against future similar acts. See Board of

Regents v. Tomanio, 446 U.S. at 488; Johnson v. Railway Express Agency, Inc., 421 U.S. at 459. The administrative procedures established in Title VII and Article 49B were designed to foster conciliation and settlement short of litigation. On the other hand, § 1981 assumes that conciliation is unavailable and thus judicial intervention is warranted. Johnson, 421 U.S. at 459, 471. Litigants under § 1981 act as private attorneys general to "prohibit all racial discrimination." See Runyon v. McCrary, 427 U.S. 160, 170 (1976).

Ultimately, the length of the limitations period must be judged according to the "practicalities of litigation" it will govern. Humphrey v. Moore, 375 U.S. 335, 358 (1964) (Goldberg, J., concurring

in result); McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 224 (1958). Where the state limitations period is so short that it would "significantly restrict the types of actions that survive," then it is inconsistent with federal policies and must not be adopted. See Robertson v. Wegmann, 436 U.S. at 594.

The length of the state statute of limitations, perhaps more than any other characteristic of a timeliness provision, must be examined for its consistency with the remedial goals of the federal action. Repeatedly, this Court has judged the consistency of state limitations statutes according to the length of the period. In DelCostello, 103 S.Ct. at 2291, for example, the Court declined to adopt a

particular limitations period within which to seek vacation of arbitration awards because the period was too short "to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights" under § 301 of the Labor Management Relations Act. Similarly, in Delaware State College v. Ricks, 449 U.S. 250 (1980), this Court considered at what point a statute of limitations should start running under Title VII and § 1981. Regardless of the triggering event adopted, the Court noted it was important that the limitations period "should not commence to run so soon that it becomes difficult for a layman to invoke the protection of the civil rights statutes." Id. at 262 n.16.

The collective experience of the federal courts has led this Court and five other circuit courts to recognize that statutes, remedial in purpose and unlikely to be understood by laypeople, such as § 1981, must be governed by limitations period long enough for the provisions to be accessible to the uninitiated.10/ In Knoll v. Springfield

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10/ See DelCostello, 103 S.Ct. at 2291; Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977) (per curiam) (limitations rule must be "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights action"); Childers v. Independent School District, 676 F.2d 1338, 1343 (10th Cir. 1982) (court rejects a 120-day limitations period as "inconsistent with the broad remedial purposes of the Federal civil rights acts"); McNutt v. Duke Precision Dental & Orthodontic Laboratories, Inc., 698 F.2d 676, 678 (4th Cir. 1983).

Township School District, 699 F.2d 137, 142 (3d Cir. 1983), cert. pending, for example, the court concluded that a six month period of limitations was too short for "the average plaintiff . . . not sufficiently conversant with the intricacies and subtleties of constitutional law to recognize the [injury], consult a lawyer, and prepare a case for filing in court. . . ."11/ Similarly, in

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11/ In his statement in support of rehearing en banc in Knoll, Judge Adams questioned whether Rule 15, Fed. R. Civ. P., permitting liberal amendment of complaints, lessened the burden on plaintiffs who, faced with a short limitations period, must hurredly file unpolished complaints. 699 F.2d at 147 n.2. Where amendment procedures are construed liberally, the disadvantage suffered by lay plaintiffs is lessened. But liberal amendment procedures only address part

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Pauk v. Board of Trustees of City University of New York, 654 F.2d 856, 862 (2d Cir. 1981), cert. denied, 455 U.S. 1000 (1982), the court affirmed the trial court's adoption of a three-year limitations period to govern § 1983 actions, finding it of sufficient length to be

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of the problem. Short limitations period force hasty and, perhaps, incomplete investigation of claims. In addition, plaintiffs risk the imposition of harsh penalities for unknowingly pursuing frivolous claims. See Christiansburg Garment Co. v. EEOC, 434 U.S. at 421. Further, premature complaints bloat an already crowded federal docket. See Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894, 903 n.26 (3d Cir. 1977); see also Address on State of the Judiciary by Warren E. Burger, Chief Justice of the United States to the ABA, February 12, 1984, at 13-15.

consistent with the "broad remedial purposes" of the statute.12/

The experience of the federal courts, therefore, suggests that the Maryland residuary statute, providing a three-year period, is not too short to defeat the remedial purposes of § 1981. Equally clear, the collective experience of the federal courts would find, as did the Fourth Circuit below, that a

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12/ In reaching its decision, Pauk rejects a time period of one year and 90 days, reasoning that any period shorter than two years will create an inequity between the liability exposure of the state government and analogous exposure of the federal government under the Federal Tort Claims Act. 654 F.2d at 862. See 28 U.S.C. §§ 1346(b) and 2680(h). See also Owen v. City of Independence, 445 U.S. 622 (1980); Picariello v. Fenton, 491 F. Supp. 1020 (M.D. Pa. 1982). Such parity is desirable.

six-month period is so short as to jeopardize the rights of the complainants whose interests the statute is designed to protect.13/

Petitioners argue, however, that countervailing federal interests compel adoption of the shorter limitations period. Pet. Br. at 20, 28-32. Petitioners cite the federal policy favoring "the relatively rapid resolution of labor

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13/ The First Circuit stands alone in its concern that a federal limitations period in excess of the state administrative period would defeat the state administrative mechanisms. See Burns v. Sullivan, 619 F.2d at 107. The court cites no evidence to support its fear that the administrative mechanism would become obsolete. Indeed, the personal and monetary costs of litigation ensure that the administrative mechanism will remain an appealing forum in which to proceed.

disputes," Pet. Br. at 20. In support of their claim, they rely on DelCostello and United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). Their reliance is misplaced.

In DelCostello, the Court was asked to determine what statute of limitations applies to suits against a union, alleging breaches of the collective bargaining agreement and the duty of fair representation. After considering a variety of state statutes, the Court adopted a federal statute, § 10(b) of the National Labor Relations Act, which governs the filing of unfair labor practice charges. 103 S.Ct. at 2293. Petitioners make much of the Court's recognition that the "relatively rapid final resolution of labor disputes [is] favored by federal

law. . . ." Id. at 2293. See Pet. Br. at 20, 25. This federal interest, however, is not undermined by a statute of limitations longer than six months. As the Court noted in DelCostello, and has noted elsewhere,14/ the peculiar nature of collective bargaining grievance machinery requires prompt and informal resolution of disputes. Far from judicial proceedings, the labor dispute resolution mechanisms the Court considered are akin to the conciliation process embodied in Title VII and Article 49B which, because of their informality and emphasis on settlements, warrant a shorter limitations period.

14/ See Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960).

Similarly, in Mitchell, this Court was faced with the question of which of two state statutes should govern an action brought under § 301(a) of the Labor Management Relations Act, alleging that the union breached its duty of fair representation and that the employer improperly discharged him. The Court characterized the action as, in essence, a suit to vacate an arbitration award, id. at 1563, and recognized there, as it later did in DelCostello, that the consensual relationship inherent in industrial self-government favored prompt resolution of disputes. Again, Petitioners rely on this policy to support their request for adoption of the six-month limitations period in Article 49B. Pet. Br. at 20. But the analogy more aptly

drawn is between the industrial dispute resolution process and Title VII or Article 49B, not § 1981.15/

B. Application of Maryland's Residuary Statute Preserves State Policies Favoring Timely Resolution of Employment Disputes and Affording Protection From Unfounded Lawsuits

Section 5-101 not only furthers federal civil rights policies but its three-year limitations period supports the state policies identified by Petitioners. In fact, a three-year limitations period

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15/ Unlike Mitchell and DelCostello, UAW v. Hoosier Corp., 383 U.S. 696 (1966) did not implicate the federal labor policies requiring the adoption of limitation periods as short six months. Instead, Hoosier Corp. involved a suit for breach of collective bargaining agreement, a simple damage claim for which, like the present case, a longer statute of limitations was adopted. 383 U.S. at 705-706.

is more consistent with the state's interest than a six-month period.

First, the three-year limitations period strengthens the public policy generally underlying limitations periods by ensuring a well-ordered judicial system. Although restricting the time period for filing claims could reduce the number of lawsuits filed, that decrease might be offset by an increase in the filing of premature or hastily drafted complaints. See Burns v. Sullivan, 619 F.2d 99, 106 (1st Cir.), cert. denied, 449 U.S. 893 (1980); Meyers v. Pennypack Woods Home Ownership Assn., 559 F.2d 894, 903 n.26 (3d Cir. 1977); Cf. Crown, Cork & Seal Co., Inc. v. Parker, ___ U.S. ___, 103 S.Ct. 2392, 2397 (1983) (where this Court, based on the same reasoning,

upheld the tolling of the applicable statute of limitations for a Title VII action by the filing of a class action). Cluttering the courts with hastily drafted complaints only embroils the courts in protracted proceedings relating to the sufficiency of the complaints and the scope of discovery.

Second, the three-year limitations period, no less than the six-month period, protects the reliability of the fact-finding process by setting a time certain in which claims must be filed. Strict rules of evidence guard against Petitioner's fear that "stale" evidence will impugn the accuracy or reliability of the fact-finding process. There is no indication that other Maryland statutes of limitations specifying that actions must

be brought within three years have posed unreasonable evidentiary problems.16/ Nor have Petitioners cited any reason why a § 1981 claim poses exceptional problems. On the contrary, § 1981 claims typically depend heavily on documentary proof, the accuracy or reliability of which will not diminish with the passage of time. See Meyers v. Pennypack Woods

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16/ Maryland has enacted several statutes of limitations in addition to § 5-101 that specify that actions must be brought within three years. See e.g., Courts Art., § 5-106(g) and (h); Art. 27, § 230A (prosecution for welfare and Medicaid fraud); Courts Art., § 3-904(g) (action for wrongful death); Art. 101, § 58 (cases where Workmen's Compensation claim involved); Courts Art., § 5-111; Art. 16, § 5C (contempt-of-court action for default on court-ordered spousal or child support); and Art. 100, §§ 55-D (claim under Maryland's Equal Pay for Equal Work Act).

Home Ownership Assn., 559 F.2d at 903 n.26.

Third, by affording an opportunity for informal dispute resolution before litigation, § 5-101 also fosters the state's interest in the prompt assertion and resolution of employment disputes by public employees without depriving an employee of judicial review. See Johnson v. Railway Express Agency, Inc., 421 U.S. at 461 (where this Court recognized that litigation chills conciliation and settlement.) If an employee pursues internal or administrative grievance procedures, as provided in Articles 49B and 64A, the process would take at least six months. By that time, the limitations period urged by Petitioners will have run. As a result, the three-year limitations period

of § 5-101 encourages informal conciliatory efforts and thereby encourages the very conduct that will achieve the quickest assertion and resolution of employment disputes. At the same time, it preserves the long-standing and pervasive view shared by states as well as the federal government that private or informal settlements are to be encouraged and that plaintiffs should resort to litigation and the courts only when that process fails. See UAW v. Hoosier Corp., 383 U.S. 696, 701 (1966); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977).

Petitioners overlook the fact that employees perhaps more than employers or the state have a keen interest in the prompt resolution of employment disputes.

Most aggrieved employees are eager to secure the relief they seek and set behind them the unfortunate or unpleasant events giving rise to their claims. In addition, contrary to the fears expressed by the First Circuit in Burns, a three-year limitations period would promote use of state administrative conciliation procedures before employees make the commitment of resources, time and emotion that litigation demands. A six-month limitations period frustrates both state and federal interests because it forces an employee to chose one process over the other or burden both.

Further, use of the three-year period of repose will not deprive defendants of certainty with respect to when or whether an action may be filed against

them. To the extent that potential plaintiffs have a claim, they may file grievances with the EEOC or with the Maryland Commission on Human Relations. Thus, in many instances, the defendants will have been alerted to the possibility of an action against them and, accordingly, will have ample opportunity to gather and preserve evidence should litigation follow. See Occidental Life Ins. Co. v. EEOC, 432 U.S. at 372. In the instant case, defendants were put on notice promptly of the claims against Coppin State College and the individuals

involved. See Pet. Br. at 8. This is hardly a case of unfair surprise.17/

Even if plaintiffs do not choose to exercise their administrative remedies, § 5-101 still affords public officers reasonable protection against unfounded or stale lawsuits. Section 5-101 reflects the policy determination of the Maryland legislature that three years constitutes an adequate period of time for a person of ordinary diligence to pursue a claim and still protects defendants against

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17/ Petitioners' argument at pp. 38-39 of their Brief grossly mischaracterizes the issues raised by Respondents' complaint. Reference to acts prior to 1975 were alleged to show a pattern or practice of discrimination. The court below accepted this position, see Grattan v. Burnett, 710 F.2d 160, 163 (4th Cir. 1983), and Petitioners do not challenge this finding.

stale or unfounded actions. Hariq v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299, 302 (Md. App. 1978). Maryland's Equal Pay for Equal Work Act, Md. Ann. Code, Art. 100, §§ 55A-D (where a private right of action for an aggrieved employee affords potential litigants three years in which to bring their complaints). Cf. Knoll v. Springfield Township School District, 699 F.2d 137, 142 (3d Cir. 1983) (where court held that the average plaintiff is not sufficiently conversant with complexities of constitutional law to recognize the deprivation, consult a lawyer and prepare and file a case within six months), and Pauk v. Board of Trustees of City Univ. of New York, 654 F.2d 856, 862 (2d Cir. 1981) (where court held that limitations

period applicable to § 1983 suit should be no less than two years).

To the extent the state has an interest in insulating its public employers from liability under § 1981, this is not the appropriate forum for such a decision. The Maryland legislature and the courts already have defined the immunity to which Petitioners are entitled. See e.g., Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). As the Second Circuit has stated, "[i]t would be anamolous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials. . . ." Pauk v. Board of Trustees, 654 F.2d at 862. Thus, Petitioners' attempt to seek

additional insulation from liability by restricting the ability of victims to protect their rights is inappropriate.

The application of the longer statute of limitations also is consistent with at least 38 other federal courts which have applied time limitations exceeding six months in civil rights actions. Although Petitioners' Petition for Writ of Certiorari represents that at least 30 states have established abbreviated periods for filing administrative claims of employment discrimination, Cert. Pet. at 10 and n.7, federal courts confronted with § 1983 or § 1981 charges have not applied those abbreviated periods to such claims. See Appendix at A-11 through A-25 for statutes of limitations applied

by federal courts of various states.18/ Although this Court has recognized that it is not essential that statutes of limitations governing federal civil

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18/ Respondent has found reported decisions only from federal courts in Massachusetts, Nebraska and Maryland applying a six-month limitations period. And in each of those three states, there are conflicting decisions. Compare Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976) (three-year statute) with Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975) (180 days) (Nebraska); Compare Ware v. Colonial Provision Co., Inc., 458 F. Supp. 1193 (D. Mass. 1978) (2 years) with Burns v. Sullivan, 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980) (6 months) (Massachusetts). The court in Burns did not overturn the district court's finding in Ware; it found the opinion inconclusive. 619 F.2d at 106. Compare McNutt v. Duke Precision Dental and Orthodontic Labs, Inc., 698 F.2d 676 (4th Cir. 1983) (3 years) with McGill v. General Electric Co., 524 F. Supp. 1126 (D. Md. 1981); reversed in part on other grounds, 685 F.2d 430 (4th Cir. 1982) (6 months) (Maryland).

rights claims be nationally uniform, see, e.g., UAW v. Hoosier Corp., 383 U.S. at 702-04 (1966), no state has settled on a period of less than one year for civil rights actions.19/ This period is twice as long as the limitations period Petitioners argue should be applied to federal civil rights cases.

III. EVEN IF ARTICLE 49B, § 9(a), IS THE MOST ANALOGOUS STATUTE OF LIMITATIONS, THE COURT SHOULD NEVERTHELESS AFFIRM THE DECISION OF THE COURT BELOW

This claim was filed on October 13, 1981. At that time, the United States

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19/ See cases cited in n.16, supra. Because the civil rights statutes protect constitutionally secured rights, an unduly short limitations period may so impair the protection of those rights as to be constitutionally infirm. The reluctance of federal courts to adopt

(Footnote continued on next page.)

District Court for the District of Maryland uniformly applied a three-year statute of limitations to claims of employment discrimination under 42 U.S.C. §§ 1981, 1983. See, e.g., McIver v. Russell, 264 F. Supp. 22 (D. Md. 1967); Hall v. Asher, 355 F. Supp. 808, 811 n.6 (D. Md. 1973); Linder v. Litton Systems, Inc., 81 F.R.D. 14, 17 (D. Md. 1978); Lewis v. Bethlehem Steel Corp., 440 F. Supp. 949, 953 (D. Md. 1977); Parish v. Maryland and Virginia Milk Producers Association, 437 F. Supp. 623, 627 (D. Md. 1977). See also Harper v. Mayor and

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19/ (Footnote continued from previous page.)

limitations periods of less than one year sets a standard according to which state statutes may be selected consistent with federal policy.

City Council of Baltimore, 359 F. Supp. 1187, 1195 n.12 (D. Md.), modified on other grounds sub nom. Harper v. Kloster, 486 F.2d 1134 (4th Cir. 1973). In addition, a panel of the Fourth Circuit had cited the three-year period as the statute of limitations applicable to employment discrimination suits under 42 U.S.C. § 1981, in a decision decided prior to October 31, 1981. See International Woodworkers, Local 5346 v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1271 (4th Cir. 1981). Respondents relied on this unbroken line of precedent. Thus it was error for the district court to diverge from settled precedent and apply its new holding retrospectively. Chevron Oil Company v. Huson, 404 U.S. 97 (1971). Therefore, even if this Court

were to hold that Art. 49B, § 9(a) is the appropriate statute of limitations, the decision of the Fourth Circuit nevertheless must be affirmed.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the decision of the Court of Appeals be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

ARTICLE 41. ANNOTATED CODE OF MARYLAND

§ 255. Same -- Judicial Review.

(a) Right to review. -- Any party aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled judicial review thereof under this subtitle.

(b) Where proceedings instituted; intervening parties. -- Proceedings for review shall be instituted in the circuit court of the county either where any party resides or has his or its principal place of business. The court, in its discretion may permit other interested persons to intervene.

(c) Stay of enforcement of decision. -- The filing of the petition does not itself stay enforcement of the agency decision. Except as otherwise provided by law, the agency may grant, or the reviewing court may order, a stay upon appropriate terms.

(d) Additional evidence. -- If, before the date set for hearing, application is made to the court for leave to present additional evidence on the issues

in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. If additional evidence is taken before the agency, it may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(e) Hearing without a jury; testimony, oral argument and written briefs. -- The review shall be conducted by the court without a jury. In cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(f) Affirmance, remand, reversal or modification of decision. -- The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings,

inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious. (1957, ch. 94; 1962, ch. 36, §§ 1, 26; 1978, ch. 884; 1982, ch. 820, § 1.)

ARTICLE 44B, ANNOTATED CODE OF MARYLAND

§ 11. Hearing.

(a) Certification of file; notice to respondent; place of hearing; transcript; duty of Commission's counsel.-- In case of failure to reach an agreement

for the elimination of the acts of discrimination and upon the entry of findings to that effect, the entire file including the complaint and any and all findings made shall be certified to. The chairman shall cause a written notice to be issued and served in the name of the Commission together with a copy of the complaint requiring the respondent to answer the charges of the complaint at a public hearing before a hearing examiner at a time and place certified in the notice.

The case shall thereupon be heard by a hearing examiner and the hearing shall be held in the county where the alleged act of discrimination took place. A transcript of all testimony at the hearing shall be made. The case in support of the complaint shall be presented at the hearing by the general counsel of the Commission.

(b) Answer and appearance of respondent; right to submit testimony and examine witnesses. -- The respondent may file a written answer to the complaint and appear at the hearing in person, or otherwise, with or without counsel. The respondent may submit testimony and shall be fully heard. He may examine and cross-examine witnesses.

(c) Amendment of complaint or answer; testimony to be under oath and recorded. -- The Commission may permit

reasonable amendment to be made to any complaint or answer. Testimony taken at the hearing shall be under oath and recorded.

(d) Power of Commission to administer oaths, etc.; subpoenas. -- In the administration and enforcement of the provisions of these several subtitles, the Commission has power to administer oaths and to issue subpoenas, to compel the attendance and testimony of witnesses and the production of books, papers, records and documents relevant or necessary for proceedings under the particular subtitle. Any such subpoena shall be served by the sheriff or deputy sheriff of the political subdivision in which is located the residence of the person or the main office of the firm, association, partnership or corporation against whom or which the subpoena is issued. In case of disobedience to a subpoena, the Commission may apply to a circuit court in any county or to a court of appropriate jurisdiction in the Supreme Bench of Baltimore City for an order requiring the attendance and testimony of witnesses and the production of books, papers, records, and documents. In case of contumacy or refusal to obey a subpoena for the attendance of a witness or the production of books, papers, records, and documents, after notice to the person subpoenaed as a witness or directed to produce books, papers, records and documents, and upon a finding that the attendance and testimony

of the witness or the production of the books, papers, records and documents is relevant or necessary for the proceedings of the Commission, the court may issue an order requiring the attendance and testimony of the witness and the production of the books, papers, records and documents. Any failure to obey such an order of the court may be punished by the court as a contempt thereof.

(e) Cease and desist order; relief. -- If upon all the evidence, the hearing examiner finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, the hearing examiner shall so state the findings. The hearing examiner shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take affirmative action to effectuate the purposes of the particular subtitle. If the respondent is found to have engaged in or to be engaging in an unlawful employment practice charged in the complaint, the remedy may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief that is deemed appropriate. The award of monetary relief shall be limited to a two-year period, except that such two-year

period shall not apply to losses incurred between the time of the Commission's final determination and the final determination by the circuit court or higher appellate court, as the case may be. Interim earning or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the monetary relief otherwise allowable. In cases of discrimination other than those involving employment nonmonetary relief may be granted to the complainant.

(f) Monetary relief limited to complaints filed after July 1, 1977. -- The provisions of subsection (e) granting the authority to award monetary relief to a complainant shall apply only to those complaints filed with the Commission on or after July 1, 1977.

(g) Order dismissing complaint. -- If upon all the evidence, the hearing examiner or the Commission finds that the respondent has not engaged in any alleged discriminatory act within the scope of the particular subtitle, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint. (1963, ch. 228, § 1; 1964, ch. 67; 1969, ch. 153; 1972, ch. 408, § 1; 1977, ch. 937; 1978, ch. 684, § 2.)

ARTICLE 64A, ANNOTATED CODE OF MARYLAND

§ 53. Employees Authorized to Present Grievances; representation; exceptions.

(a) Any employee classified or unclassified, of the executive branch of the State government, unless excepted by subsection (c) of this section, may present any grievance which he may have, in accordance with the provisions of this subtitle free from interference, coercion, restraint, discrimination or reprisal.

(b) Any employee authorized to present a grievance may be represented at any stage of the grievance procedure by any person or persons of his choice.

(c) The following persons are excepted from the provisions of this subtitle:

(1) Persons appointed by the Governor or whose appointment requires gubernatorial approval;

(2) Deputy Attorneys General and assistant Attorneys General, and all attorneys on the staff of the Attorney General including counsel to the principal departments of the executive branch of the State government;

(3) The chief deputy comptroller, and the chief deputy treasurer;

(4) Persons who are subject to collective bargaining agreements containing other grievance procedures;

(5) Persons who are subject to contracts, rules or regulations concerning teacher tenure, including employees on a faculty staff;

(6) Student employees;

(7) Patients and inmates in State institutions;

(8) Police officers of the Maryland State Police;

(9) The State Public Defender, the deputy public defender, district public defenders and assistant public defenders;

(10) Elected State officials;

(11) Employees of the Department of Personnel for whom the Secretary shall provide an alternative procedure similar to the procedure prescribed by this subtitle;

(12) Classified employees of the University of Maryland for whom

a grievance procedure exists in § 7 of the University of Maryland publication known as "Personnel Practices for Classified Employees" except as modified by Title 13, Subtitle 1 of the Education Article;

(13) Persons in unclassified positions at the various State universities and colleges which are comparable to positions on the associate staff of the University of Maryland, provided that the respective boards of trustees of the various State universities and colleges undertake a review of such positions for the purpose of:

(i) Determining which positions should be classified and promptly classifying them; and

(ii) Determining as to the rest what changes are appropriate to be made to the grievance procedure applicable to the faculty staff, in light of the grievance procedure adopted by this subtitle;

(14) Persons holding positions on the associate staff of the University of Maryland, provided that the president of the university undertakes a review of such positions for the purpose of:

(i) Determining which positions should be classified and promptly classifying them; and

(ii) Determining as to the rest what changes are appropriate to be made to the grievance procedure applicable to the faculty staff, in light of the grievance procedure adopted by this subtitle. (1977, ch. 727; 1978, ch. 537, § 2.)

COMAR 14.03.01.02.F

F. Notice

(1) After the authorization of an individual complaint by the Executive Director, as set forth in § E, above, and not more than 120 days from the date on which this complaint was filed, the Commission staff shall provide notice of it by serving a copy of the complaint upon respondent.

(2) If timely notice is not made in accordance with § F(1), above, the respondent may, within 30 days from the date of receipt of the complaint, file a motion to dismiss the complaint, supported by a written memorandum. The Executive Director shall consider the motion

without oral argument and either grant or deny the same after considering among other factors whether respondent was unduly prejudiced by the lack of timely notice. Notice of the Executive Director's decision shall be given to the complainant and respondent.

COMAR 14.03.01.03.A

A. Investigation.

Upon the authorization of a complaint, the Executive Director or his designee shall assign, or cause to be assigned, the investigation of the complaint to a staff investigator who shall endeavor to gather promptly all information necessary and relevant to the making of a fair determination of the alleged discrimination. Any such investigation (except those undertaken pursuant to Regulations .09A and .09B, below) shall conclude with a written finding, as hereinafter provided, within two years from the date on which notice of the complaint is forwarded to the respondent; provided, however, that no such time limitation may apply to those cases in which any respondent to a complaint has refused or failed to comply voluntarily with Commission requests for information, in a timely fashion or to those cases in which respondent has instituted any

proceedings (except those set forth in Regulations .03C(3), .04 and .04C), which result in the delay of an investigation. Written findings may not be required for any complaint which is disposed of under Regulations .02H above, or .04, below. If an investigation is not completed in accordance with the provisions of this section, the respondent may file a motion to dismiss the complaint. The motion shall be supported by a memorandum of fact and law setting forth therein the reasons why the respondent is requesting dismissal of the complaint. The Executive Director shall consider this motion and shall grant or deny this motion after considering, among other factors, whether the respondent has been unduly prejudiced by the failure to complete this investigation within the time specified in this section. Notice of the Executive Director's decision shall be provided to all parties.

COMAR 14.03.01.07.H

H. Conduct of Hearing.

(1) The complainant and the respondent shall have the right to be represented by counsel, to be present, and to participate. The right to participate shall include the right to examine

and cross-examine witnesses, and to introduce evidence into the hearing.

(2) All hearings shall be conducted by a hearing examiner in accordance with these regulations.

(3) All hearings once commenced shall continue on successive workdays until completed, unless the hearing examiner rules otherwise.

(4) All hearings shall be open to the public.

(5) A complete record of the proceedings shall be made.

TABLE

STATE LAW INTERPRETED	STATUTE OF LIMITATIONS APPLICABLE	AUTHORITY
AL	1 yr.	Ingram v. Steven Robert Corp., 547 F.2d 1260 (5th Cir. 1977); Womack v. Shell Chemical Co., 514 F. Supp. 1062 (S.D. Ala. 1981)
AK		No cases reported
AZ	1 yr.	Tyler v. Reynolds Metals Co., 600 F.2d 232 (9th Cir. 1979)
AR	3 yrs.	Martin v. Georgia-Pacific Corp., 568 F.2d 58 (8th Cir. 1977)

CA	3 yrs.	Wiltshire v. Standard Oil Co. of California, 652 F.2d 837 (9th Cir. 1981)
CO	6 yrs.	Zuniga v. AMFAC Foods, Inc., 580 F.2d 380 (10th Cir. 1978)
CT	3 yrs.	Williams v. Walsh, 558 F.2d 667 (2d Cir. 1977)
DE	3 yrs.	Goldsmith v. E. I. DuPont, 32 FEP Cases 1879 (D. Del. 1983); Trader v. Fiat Distributors, Inc., 476 F. Supp. 1194 (D. Del. 1979)

FL	2 yrs.	Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. 1980)
GA	2 yrs.	Persons v. United Parcel Service, Inc., 502 F. Supp. 1176 (N.D. Ga. 1980)
HI		No cases reported
ID	3 yrs.	Gowin v. Altmiller, 455 F. Supp. 743 (D. Idaho 1978)
IL	5 yrs.	Perkins v. Hendrickson Manufacturing Co., 610 F.2d 469 (7th Cir. 1979)

IN	2 yrs.	Movement for Opportunity and Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980)
IA	5 yrs.	Tatum v. Golden, 570 F.2d 753 (8th Cir.), cert. denied, 436 U.S. 960 (1978)
KS	3 yrs.	Burns v. Union Pac. R.R., 564 F.2d 20 (8th Cir. 1977)
KY	1 yr.	Hines v. Board of Education, 492 F. Supp. 469 (E.D. Ky. 1980), aff'd, 667 F.2d 564 (6th Cir. 1982)

LA	1 yr.	Page v. U.S. Industries, Inc., 556 F.2d 346, (5th Cir. 1977), cert. denied, 434 U.S. 1045 (1978); Adams v. Jefferson Davis Parish School Board, 450 F. Supp. 1141 (W.D. La. 1978)
ME	2 yrs.	Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (D. Me. 1977)
MD	3 yrs./ 6 mos.	McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983) (3 yrs.); McGill v. General Electric Co., 524 F. Supp. 1126 (D. Md. 1981) (6 mos.)

MA	2 yrs./ 6 mos.	Ware v. Colonial Provision Co., Inc., 458 F. Supp. 1193 (D. Mass. 1978) (2 yrs.); Burns v. Sullivan, 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980) (6 mos.)
MI	3 yrs.	Richards v. I.B.M. Corp., 504 F. Supp. 1369 (E.D. Mich. 1981)
MN	2 yrs.	Morrey v. Independent School District 2 FEP Cases 974 (D. Minn. 1969)
MS	6 yrs.	Truvillion v. King's Daughters Hospital, 614 F.2d 520 (5th Cir. 1980)

MO	5 yrs.	Allen v. Amalagamated Transit Union Local 788, 554 F.2d 876 (8th Cir.) cert. denied, 434 U.S. 891 (1977)
MT	2 yrs.	Strung v. Anderson, 452 F.2d 632 (9th Cir. 1971); Swan v. Matthews, 555 F. Supp. 495 (D. Mont. 1982)
NE	3 yrs./ 6 mos.	Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976); Metcalf v. Omaha Steel Castings Co., 476 F. Supp. 870 (D. Neb. 1979) (3 yrs); Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975) (6 mos.)

NV		No cases reported
NH	90 dys./ 6 mos. or 6 yrs.*/	Dewey v. Univ. of New Hampshire, 694 F.2d 1 (1st Cir. 1982)
NJ	2 yrs.	Peltack v. Borough of Manville, 547 F. Supp. 770 (D. N.J. 1982)
NM	4 yrs.	Gunther v. Miller, 498 F. Supp. 882 (D. N.M. 1980)
NY	3 yrs.	Pauk v. Board of Trustees of City Univ. of New York, 654 F.2d 856 (2d Cir. 1981)

*/ The court did not reach the question of which of three limitations periods applied because the claim was time-barred under all of the statutes.

NC	3 yrs.	King v. Seaboard Coast Line R.R. Co., 538 F.2d 581 (4th Cir. 1976)
ND		No cases reported
PA	3 yrs.	Knoll v. Springfield Township School District, 699 F.2d 137 (3d Cir. 1983)
OH	6 yrs.	Mason v. Owens-Ill., Inc., 517 F.2d 520 (6th Cir. 1975); Balmes v. Board of Education of Cleveland, 436 F. Supp. 129 (N.D. Ohio 1977)
OK	2 yrs.	Smith v. Woodhollow Apartments, 463 F. Supp. 16 (W.D. Okla. 1978)

OR	6 yrs.	Plummer v. Western International Hotels Co., Inc., 656 F.2d 502 (9th Cir. 1981)
RI	10 yrs./ 3 yrs.	Vanlaarhoven v. Newman, 564 F. Supp. 145 (D. R.I. 1983) (10 yrs.); Partin v. St. Johnsbury Co., Inc., 447 F. Supp. 1297 (D. R.I. 1978) (3 yrs.)
SC	6 yrs.	Simmons v. South Carolina State Ports Authority, 495 F. Supp. 1239 (D.S.C. 1980)
SD		No cases reported

TN	1 yr.	Willett v. Wells, 469 F. Supp. 748 (E.D. Tenn. 1977) aff'd 595 F.2d 1227 (6th Cir. 1979)
TX	2 yrs.	Jones v. City of San Antonio, 568 F.2d 1224 (5th Cir. 1978)
UT		No cases reported
VT		No cases reported
VA	2 yrs.	Runyon v. McCrary, 427 U.S. 160 (1976)
WA	2 yrs.	No cases reported
WV	2 yrs.	McCausland v. Mason County Board of Education, 649 F.2d 278 (4th Cir. 1981)

WI	6 yrs.	Tucker v. Harley Davidson Motor Co., 454 F. Supp. 738 (E.D. Wis. 1978); Coleman v. Clark Oil and Refining Co., 568 F. Supp. 1035 (E.D. Wis. 1983)
WY	1 yr.	Courtney v. School Dist. No. 1, 371 F. Supp. 401 (D. Wyo. 1974)

Supreme Court, U.S.
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CLERK

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
ARGUMENT:	
Art. 49B Provides Maryland's Most Analogous Limitations Period For Bias Suits Brought By Public Employees Under 42 U.S.C. § 1983 And Should Not Be Rejected Just Because It Governs An Administrative-Judicial Remedy	2
The Maryland Statute Is Not Inconsistent With Section 1983 Simply Because It Provides A Six-Month Limitations Period	8
CONCLUSION	16

TABLE OF CITATIONS

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	6
Autoworkers v. Hoosier Cardinal Corp., 383 U.S. 696 (1965)	7
Banach v. State Commission on Human Relations, 277 Md. 502, 356 A.2d 242 (1976)	5
Board of Regents v. Tomanio, 446 U.S. 478 (1980)	7, 12, 13, 14
Brice v. Crown, Cork & Seal Co., No. H-78-1207 (D. Md. 1982)	15
Burns v. Sullivan, 619 F.2d 99 (1st Cir.), *cert denied*, 449 U.S. 893 (1980)	14, 15
Chambers v. Omaha Public School District, 536 F.2d 222 (8th Cir. 1976)	14

PAGE

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 15

Clayton v. Autoworkers, 451 U.S. 679, (1981) 11

DelCostello v. International Brotherhood of Teamsters, 103 S. Ct. 2281 (1983) *passim*

Holden v. Massachusetts Comm'n Against, 671 F.2d 30 (1st Cir.) *cert denied*, 103 S. Ct. 97 (1982) 14

Ingram v. Steven Robert Corp., 542 F.2d 1260 (5th Cir. 1977) 14

Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) 7, 12, 13

Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982) 5, 7, 8

Lay v. Bethlehem Steel Corp., 542 F. Supp. 9 (D. Md.), *aff'd* on other grounds, 681 F.2d 814 (4th Cir.) *cert. denied*, 103 S. Ct. 497 (1982) 15

Machinists v. Central Airlines, 372 U.S. 682 (1963) 11

McGill v. General Electric Co., 524 F. Supp. 1126 (D. Md. 1981) 15

McKee v. SCM Corp., No. R-79-162, (D. Md. 1982) 15

Migra v. Warren City School District Board of Education, 104 S. Ct. 892 (1984) 8, 13

Morton v. Georgia Pacific Corp., 658 F.2d 58 (8th Cir. 1977) 14

Movement for Opportunity & Equality v. General Motors Corp., 622 F.2d 1235 (7th Cir. 1980) 14

Pauk v. Board of Trustees, 654 F.2d 856 (2nd Cir. 1981), *cert denied*, 455 U.S. 1000 (1982) 8

Robertson v. Wegmann, 436 U.S. 584 (1978) 7, 9, 14

PAGE

Stung v. Anderson, 452 U.S. 632 (9th Cir. 1971) 14

State Commission on Human Relations v. Baltimore County, 46 Md. App. 45, 415 A.2d 856 (1980) 3, 5

Tyler v. Reynolds Metal Co., 600 F.2d 232 (9th Cir. 1979) 14

Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89, 94 11

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 7, 9, 11, 12

United States, ex rel. Arant v. Lane, 249 U.S. 367 (1919) 8, 11

Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975) 14

William v. Walsh, 558 F.2d 667 (2nd Cir. 1977) 14

Constitutional Provisions, Statutes, Rules and Regulations

United States Code:

29 U.S.C.—

§ 160(b) (National Labor Relations Act § 10(b)) 2, 6, 7, 11

§ 626 11

42 U.S.C.—

§ 1981 12

§ 1983 ..... 1, 2, 5, 7, 10

§ 1988 ..... 7, 10

§ 2000e- 4, 5, 11

Federal Rules of Civil Procedure:

Rule 8(a) 3

Rule 15 3

	PAGE
Code of Federal Regulations:	
29 C.F.R.—	
§ 101.2	6
§ 101.4-8	6
§ 102.12(d)	6
Maryland Rules of Procedure:	
Rule BE44	8
Rule BF	8
Code of Maryland Regulations:	
COMAR—	
14.03.01.02	3
14.03.01.03	4, 6
14.03.01.04	6
14.03.01.07B	3, 4
Annotated Code of Maryland:	
Article 49B	*passim*

No. 83-264

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CALVIN W. BURNETT,
PRESIDENT OF COPPIN STATE COLLEGE;
J. CARSON DOWELL; EDMUND C. MESTER; AND
RONALD K. DESOUZA,
VICE PRESIDENT OF STUDENT AFFAIRS, COPPIN STATE COLLEGE,
Petitioners,

v.

JAMES R. GRATTAN AND ADRIENNE S. HEDMAN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONERS

INTRODUCTION

Respondents argue that there is a longer (three-year) limitations period within Maryland's fair employment statute and either it or the State's three-year catch-all limitations period should apply to a § 1983 employment discrimination suit. However, unless the Maryland statute is distorted and its provisions ignored, it is apparent that the Maryland fair employment practice statute contains no statute of limitations other than the six-month period. Moreover, Respondents have not explained — indeed have

not suggested — how a catch-all limitations statute could be more analogous to a § 1983 employment discrimination suit than a fair employment statute explicitly providing a remedy for employment discrimination.

Respondents' real objection seems to be to (1) borrowing the limitations period from a statute that is not purely judicial and (2) applying a "too short" six-month period to any § 1983 cause of action. Yet this Court's recent holding in *DelCostello v. International Brotherhood of Teamsters*, 103 S. Ct. 2281 (1983) and the striking parallels between Art. 49B and § 10(b) demonstrate that Respondents have no *legal* basis for their objection to the nature of the Art. 49B process. Furthermore, while it is clear that a feeling that six months is "too short" animated the opinion below, as well as Respondents' position, Respondents totally ignore the leavening impact of liberal pleading and amendment procedures. More importantly, they have not confronted the history of the civil rights statutes and this Court's recent decisions, all establishing that six months is not "too short" in any abstract, or categorical sense. In fact the six-month limitation of Art. 49B not only governs the most analogous state cause of action, but is a reasoned, deliberate reflection of an existing national policy favoring prompt filing of employment disputes. Accordingly, it should be applied by this Court to Respondents' § 1983 employment discrimination suit.

ARGUMENT

ART. 49B PROVIDES MARYLAND'S MOST ANALOGOUS LIMITATIONS PERIOD FOR BIAS SUITS BROUGHT BY PUBLIC EMPLOYEES UNDER 42 U.S.C. § 1983 AND SHOULD NOT BE REJECTED JUST BECAUSE IT GOVERNS AN ADMINISTRATIVE-JUDICIAL REMEDY.

Respondents Grattan and Hedman acknowledge, as they must, that the statute of limitations covering the most analogous state cause of action must control their action. In their attempt to circumvent Maryland Art. 49B, however, Respondents (1) mischaracterize that important

Maryland statute, and (2) skip past this Court's recent application of a statute of a limitations governing a similar administrative-judicial remedy.

(1) Respondents' mischaracterization of Art. 49B begins with their description of the complaint which initiates the Art. 49B process. They state, for example, that the person against whom a complaint is made is not "put on notice" of the nature of the complaint until he receives a Commission complaint "detail[ing] the particulars of the charges against [him]." Respondents' Brief, p. 11. That is simply incorrect. An Art. 49B complainant must set forth the "particulars" of the claimed act of discrimination, Art. 49B, § 9(a), and must do so under oath. *Id.*[1] The requirement of particularity ensures that the sworn complaint cannot be filed without factual averment of a discriminatory practice, *State Commission on Human Relations v. Baltimore County*, 46 Md. App. 45, 415 A.2d 856 (1980), and a complainant who sets forth improper allegations for malicious reasons is subject to criminal penalties. Art. 49B, § 12(b).

Obviously, in terms of formality and gravity, the Art. 49B complaint compares favorably with a complaint filed in compliance with Rule 8(a) of the Federal Rules of Civil Procedure. (A "short and plain statement of the claim"). Both are "notice pleading", subject to similar amendment rules (*compare* F.R.C.P. 15 with COMAR 14.03.01.02, "amendment to allege additional acts . . . which are related to or grow out of the subject matter of the original complaint"), and not — properly — to be taken lightly. It should be apparent that challenging an employment decision under Art. 49B imposes requirements that are distinctly similar to filing a § 1983 complaint, and Respondents' assertions to the contrary are inexplicable.

[1] The particularized complaint must be served on the respondent-employer by Commission staff. COMAR 14.03.01.02.F.1.

Respondents' mischaracterization of Art. 49B extends beyond their assertion that the complaint need not contain particulars. They also confuse the structure of that statute, and suggest — erroneously — that there is a Commission complaint subject to a three-year time period that should be the model. It is true that the Commission by rule has given itself two years to investigate a complaint. COMAR 14.03.01.03.A. It is not true that the Commission investigation, or the "written findings" that ensue are in any way analogous to a private § 1983 discrimination action. The Commission is given time to complete an evaluation investigation, permitting Commission staff to make findings, after gathering "all information necessary and relevant to the making of a fair determination of the alleged discrimination." COMAR 14.03.01.03.A. The time period allotted for the weighing and evaluation is necessarily longer than that given to a complainant to make an allegation on a matter as to which he or she has personal knowledge.

To characterize Commission probable cause findings as a "complaint", and suggest that the time period allotted for that agency fact finding is a statute of limitations at all, let alone one covering an analogous cause of action, as Respondents do, (Respondents' Brief, p. 15) can hardly assist this court.[2]

Though the Maryland statute, like Title VII, gives the administrative agency the option of issuing a Commission complaint, that institutional allegation is not covered by a three-year time limit and it may be wholly unrelated to any individual complaint.[3] Art. 49B, § 9(b). When an

[2] If the "written finding" is one of probable cause to believe discrimination has occurred, and if conciliation fails, the written finding becomes incorporated within a statement of charges by Commission general counsel. COMAR 14.03.01.07.B.

[3] No limitations period is specified for the Commission complaint, and no Maryland case has decided whether such a

individual has complained, the Commission need issue no complaint at all, and normally does not.

In short, there is absolutely no justification for Respondents' claim that the Commission complaint, in those rare cases where there is a Commission complaint, is the better analogy to a § 1983 bias action. Nor is there any justification for Respondents' claim that an Art. 49B complaint lacks the dignity and formality, and does not entail the level of preparation, of a § 1983 complaint. The Art. 49B complaint initiates a serious and important state proceeding, of the type that Congress specifically encouraged when it enacted Title VII, *Kremer v. Chemical Construction Corp.*, 456 U.S. 461 (1982), and embodies a state of action that is wholly analogous to Respondents' § 1983 suit.

(2) In fact, it has become clear that Respondents object, not to any specific aspect of Art. 49B, but to borrowing the limitations period of *any* administrative-judicial process. The Respondent employees offer no serious justification for their position, however. Nor do they confront the holding of this Court in *DelCostello* to the contrary — explicitly choosing a six-month limitation period for filing an *administrative* complaint over state statutes of limitation that the Court considered imperfect analogies.[4] In *DelCostello*, though two Justices expressed concern with the

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complaint is covered by the six-month period or is truly unlimited in time. It was the uncommon Commission complaint mechanism that the court dealt with in *Banach v. St. Comm. on Human Relations*, 277 Md. 502, 356 A.2d 242 (1976), holding that no particularity is required for that institutional complaint. *Banach* is discussed in the later case of *St. Comm. on Human Relations v. Baltimore County*, *supra*, which concerned an individual complaint and applied the statutory requirement of particularity.

[4] If the Court in the instant case were to reject any of the state statute of limitations and search for a federal limitations period, the limitations period obviously applicable would be that of Title VII — which is six months, the same as the period of Art. 49B.

propriety of applying a federal limitations period in lieu of a state limitations period, no member of the Court suggested that the application of a limitation period governing the filing of an administrative complaint was in any way improper or even controversial. In fact, the plain language of *DelCostello* suggests that the Court's focus must be on the closest analogy to the given § 1983 cause of action, not on some artificial characterization of the nature of the analogous proceeding as primarily judicial or administrative.

DelCostello should control the result in the instant case. The parallels between § 10b of the National Labor Relations Act, which the Court borrowed in *DelCostello*, and Art. 49B, could not be more striking. Both involve a complaint which triggers an administrative investigation. Both complaints (the § 10b complaint is called a "charge", 29 C.F.R. § 101.2) are subject to probable cause evaluation, and findings, before a hearing will be held. (The Maryland agency makes "written findings", COMAR 14.03.01.03.A; Board counsel render a "determination". 29 C.F.R. § 101.4-8.) Neither complaint leads directly or immediately to court action. Both require a succinct factual allegation (29 C.F.R. § 102.12(d): "a clear and concise statement of the facts constituting the alleged unfair labor practices"; Art. 49B, § 9(a): "together with the particulars thereof"). Both call for conciliation efforts before and after the initial administrative investigation. Art. 49B, § 10b; COMAR 14.03.01.04; 29 C.F.R. § 101.7, .9. Both lead to an administrative hearing at which the administrative agency is at least nominally the presenter of evidence. Both provide reinstatement and backpay.[5]

[5] The striking parallels between the Art. 49B processes and the National Labor Relations Act processes should not be surprising. The National Labor Relations Act was the model for many modern administrative processes, including that of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). Title VII, in turn, set the standard for state fair employment practice laws after 19[illegible]

If the limitations period of Art. 49B complaint is insufficiently judicial ("fundamental dissimilarity of judicial and administrative schemes" is Respondents' term, Respondents' Brief, p. 25) then so too would have been § 10b of the National Labor Relations Act, and *DelCostello* would have *rejected* the NLRA complaint period. But the Court did not reject it. The Court borrowed the § 10b six-month period as most analogous to a § 301 judicial cause of action, choosing § 10(b) as more analogous to the § 301 judicial action than any state judicial cause of action. And no member of the Court suggested that use of the limitation period for that "administrative" cause of action was objectionable. *DelCostello, supra.* It is no wonder that Respondents passed by *DelCostello* so quickly.

In § 301 actions, as in § 1983 actions, the Court's duty is to determine the limitations period covering the most analogous cause of action. It did so in *Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1965), determining that the nature of the cause of action made the six-year limitation the appropriate period for that § 301 suit. It did so in *DelCostello* and *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), choosing six month and 90-day limitations periods, as periods covering the most analogous causes of actions for those § 301 suits. The Court's duty here is to do no more, and no less, and a fair analysis of the Maryland statute demonstrates clearly that the six-month limitations period of Art. 49B is the closest possible analogy. 42 U.S.C. § 1988, and the Court's prior cases, including *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *Robertson v. Wegman*, 436 U.S. 584 (1978); and *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), compel application of Maryland's fair employment practice law limitation period.

In fact, rejecting Art. 49B because it is a combined administrative and judicial statute not only would conflict with *DelCostello*, but would also be completely at odds with the Court's recent decision in *Kremer*, *supra*, 456

U.S. 461 and *Migra v. Warren City School Dist. Bd. of Educ.*, 104 S. Ct. 892 (1984). The Maryland Human Relations Commission's disposition of an Art. 49B complaint, reviewed in court, would have claim preclusive effect on a § 1983 suit. *Migra, supra.* For this Court to follow *Kremer* and *Migra* with a decision that Art. 49B — entirely suitable for claim preclusion — was insufficiently judicial to borrow its limitations period, would be, at best, a terrible irony.

That irony, that unfairness, would be compounded in the case of a Maryland public employment dispute, for the Art. 49B process replaced a wholly judicial cause of action that was itself a nearly perfect analogy to a § 1983 public employment suit.[6]

THE MARYLAND STATUTE IS NOT INCONSISTENT WITH SECTION 1983 SIMPLY BECAUSE IT PROVIDES A SIX MONTH LIMITATIONS PERIOD.

The heart of the Respondents' position is that a six month limitation is simply too short to be consistent with § 1983. Respondents' Brief pp. 30-42. Their reasoning

[6] An action for mandamus affords both legal (Maryland Rule BE 44) and equitable (Maryland Rules BF 1 *et. seq.*) relief, and has long been the traditional remedy in Maryland for public employees to challenge improper removal from their employment. Petitioners' Brief, pp. 21-23. *See also United States Ex Rel Arant v. Lane*, 249 U.S. 367 (1919) for an example of similar use of mandamus. The traditionally short mandamus laches period (see Petitioners' Brief, p. 23) complements the Maryland legislative judgment to require prompt filing of an Art. 49B action. And the history of the use of mandamus in Maryland for such purposes and its replacement by Art. 49B clearly corroborates the analysis of the Art. 49B cause of action itself, *i.e.*, that 49B provides a cause of action closely analogous to the cause of action asserted by Respondents under § 1983. While Respondents assert that the writ of mandamus is not analogous to a § 1983 public employment action, they cite only *Pauk v. Board of Trustees*, 654 F.2d 856 (2d. Cir. 1981) *cert. denied*, 455 U.S. 1000 (1982) in which the court made that assertion, categorically, as to all § 1983 actions, without citation and even without explanation.

seems to be that the civil rights statutes are important and remedial, and that a shorter limitations period is necessarily inconsistent with such statutes.

They ignore, of course, the teaching of this Court in such cases as *Robertson v. Wegmann* that application of state law is not inconsistent with § 1983, "merely because the statute causes the plaintiff to lose the litigation." *Robertson v. Wegmann, supra,* 593. They ignore, also, the history of short limitations periods during the reconstruction years, history which suggests strongly that the Reconstruction Era congresses — which enacted § 1983 and § 1988 specifying reliance on state law — would have been quite comfortable with a six month limitation period for a § 1983 suit. *See* Petitioners' Brief, 35-36.

Respondents cite *DelCostello* as the lone example of a limitations period rejected by this Court because it was "too short." Respondents' Brief at 33. They neglect to confront the facts that while the Court rejected a ninety day limitations period in *DelCostello* for one type of § 301 action, it found the same ninety-day period wholly satisfactory for another § 301 action, *United Parcel Service v. Mitchell, supra,* and that in *DelCostello* itself the Court endorsed and adopted a six-month limitation period.[7] *DelCostello* and *United Parcel Service v. Mitchell* are apt and very recent examples of the Court's adoption of a limitation period of six months or less as a fully sufficient period of time for filing federal statutory lawsuits in federal court.

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[7] The Court's concern with the length of the limitations period in *DelCostello* was due less to the adequacy of New York's ninety-day period, than to the existence of similar statutes in other states with time limits of thirty, twenty, even ten days, *DelCostello,* 2291, n.15, short time periods that the Court felt might exacerbate problems of the accrual of a "denial" of fair representation. *DelCostello,* 2291, n.16.

And though Respondents seek to disparage the § 301 cause of action dealt with in *DelCostello* (passing it off, for example, as a "labor dispute resolution mechanism", Respondents' Brief, p. 40) the *DelCostello* decision itself evidences the Court's appreciation of the tasks confronting that § 301 litigant before his suit could be filed. The Court noted that the § 301 plaintiff would need time to: 1) retain counsel; 2) evaluate the adequacy of the union's representation; 3) investigate substantial matters that were not at issue in the arbitration proceeding and 4) frame his suit. *DelCostello, supra*, 2291. The Court held, of course, that six months was *adequate* for all such preparatory steps and that even the shorter ninety-day limitations period might have to suffice for each of those steps "if state law were the only source reasonably available for borrowing, as it often is." *Id.*, 2293.

In a § 1983 employment discrimination suit — particularly a discharge case — the issues involved may be much more readily apparent than issues found in a fair representation suit under § 301. The instant case is an appropriate example. Respondents are white employees of a predominately black-managed institution, who claimed dissimilarity of treatment compared to their black colleagues. Evidence at trial of some such suits could be complex, but the cause of action is not a conceptually difficult one. If § 301 causes of action, such as those dealt with in *DelCostello* or *United Parcel Service v. Mitchell*, can be adequately investigated and articulated in six months or less, surely Respondents' § 1983 suit can be as well.

Obviously, there is no practical barrier to prompt assertion of § 1983 employment discrimination claims and no barrier to use of the state law of limitations contemplated by Congress in § 1988.

There is an even more fundamental error underlying Respondents' argument that something in the nature of

the civil rights statutes makes them completely inconsistent with a six-month limitation. Respondents have posited the existence of a broad, across-the-board "appropriate" limitations period, acceptable and proper in some Platonic sense no matter what the § 1983 cause of action. That assumption is bad law, inconsistent with precedents of this Court. It necessarily disregards the fact that a § 1983 employment discrimination suit *is* an employment discrimination suit, should be analogized to a similar employment discrimination cause of action, and must be considered along with the existing national policy favoring prompt filing of such complaints, a policy that Maryland shares with most states — at least thirty [8] — and the United States, *e.g.*, Title VII, Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-5(e) and 2000e-16(c); Age Discrimination in Employment Act, 29 U.S.C. § 626; Labor Management Relations Act, 61 Stat. 146, 29 U.S.C. § 160(b). This policy has in fact often been noted by this Court. *See e.g. DelCostello v. Teamsters*, 103 S. Ct. 2281 (1983); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 63 (1981); *Clayton v. Autoworkers*, 451 U.S. 679, 693 (1981); *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89, 94 (1978); *Machinists v. Central Airlines*, 372 U.S. 682, 689 (1963); *United States ex rel Arant v. Lane, supra.*

The national policy evident in each of these statutes and opinions reflects the undesirability of holding "in limbo for long periods", *United Parcel Service, Inc. v. Mitchell, supra*, at 1565, important employment decisions. And while that may be fairly said of the car washer's job at issue in *Mitchell*, it should be said with all the more conviction in public employment cases. A consideration of the jobs performed by Respondents Grattan and Hedman is instructive. Respondents Grattan and Hedman, both white, were, respectively, Director of Minority Relations and Minority Recruitment Counselor at the predominantly black Coppin State College. The mission of

[8] *See* Petition for Writ of Certiorari, p. 10, n.7.

their Office of Minority Relations was to increase minority enrollment at Coppin State College. Whether their discharge was due to their race as they allege, or their performance as the College advised them, A.34-39, it should go without saying that the mission of Coppin's Office of Minority Relations cannot be effectively carried out without a Director or with an acting or temporary director.

The facts of the very case before the Court graphically underscore the reasonableness of the national policy of prompt resolution of employment disputes, especially in the public context. Application of Art. 49B's requirement of *prompt* filing of such claims can hardly be termed "inconsistent with the federal policy underlying the cause of action under consideration." *Johnson v. Railway Express Agency, supra,* 465; *Board of Regents v. Tomanio, supra,* 485. The fact that an employee's discharge is challenged by a § 1983 suit rather than by a § 301 suit as in *DelCostello* and *United Parcel Service v. Mitchell,* should not make this Court suddenly reluctant to apply a state limitations period that reflects the state's own "value judgment," *Johnson v. Railway Express Agency, supra,* 464, and the national policy.

The Respondent employees do not deny, for they cannot, the national policy in favor of prompt resolution of employment disputes. Respondents instead actually suggest that Maryland's three-year catch-all limitations period better furthers that national policy. For support they opine that the six-month period will encourage "hastily drafted complaints", Respondents' Brief, p. 44, and still more dubiously assert that "§ 1981 claims typically depend heavily on documentary proof",[9] Respon-

[9] While some civil rights claims may "depend heavily on documentary proof", others very clearly do not. And the type of documentary proof that may be important in a discharge case (employer records, statistics and the like) is singularly un-

dents' Brief, p. 45. Respondents also attempt to prove the unprovable — that a three-year period complements the national policy of prompt resolution of employment disputes better than the six month period (an assertion that would be a great surprise to Congress and the many state legislatures that have adopted six month provisions).

Respondents also make the claim that a three-year period would foster "informal dispute resolution before litigation", Respondents' Brief, p. 46, because it would permit an employee to file a § 49B claim before electing to file a § 1983 claim. Respondents' assertion: (1) directly conflicts with this Court's disposition of almost precisely the same argument in *Johnson v. Railway Express Agency, supra,* 461 ("these are the natural effects of the choice Congress has made available to the claimant by its conferring upon him independent administrative and judicial remedies; the choice is a valuable one"; and (2) disregards the fact that if an employee pursues his Art. 49B claim through judicial review, he cannot later resort to a § 1983 claim, whether the limitations period is six months or six years, because the decision of the state court will be claim preclusive. *Migra v. Warren City School District, Board of Education, supra.*

As demonstrated in Petitioner's initial brief, pp. 32-34, other federal policies to be considered similarly suggest no reason for disregarding Maryland's six month provision. Deterrence and compensation are hardly impaired by the application of a state statute of limitations which permits assertion of § 1983 rights with full vigor. No doubt application of a six month limitations period, like adoption of state tolling (*Tomanio*) or survivorship rules (*Robertson*

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available to the employee prior to suit. The idea that an employee if given greater than six months can gather such data is pure fiction.

v. Wegman) may result in defeat of some § 1983 actions, but as this Court has observed, that is surely not dispositive. *Tomanio, supra,* 488; *Robertson, supra,* 593.

Finally, Respondents, while conceding that this Court has "recognized that it is not essential that statutes of limitations governing federal civil rights be nationally uniform" make the incredible assertion that "no state law has settled on a period of less than one year for civil rights actions," and therefore application of the Maryland Statute would frustrate a uniformity policy. Brief of Respondents at 55. In fact, only two circuits, other than the court below, have considered what limitations period is to be applied in an employment discrimination suit brought under the civil rights acts by a public employee.[10] And the First Circuit in a series of well reasoned opinions has concluded that a six month limitations period is applicable to such cases. *See e.g. Holden v. Massachusetts Comm'n Against,* 671 F.2d 30 (1st Cir.), *cert denied,* 103 S. Ct. 97 (1982); *Burns v. Sullivan,* 619 F.2d 99 (1st Cir.), *cert denied,* 449 U.S. 893 (1980). The Eighth Circuit held to the contrary in *Chambers v. Omaha Public School District,* 536 F.2d 222 (8th Cir. 1976) but did not address the fact that the plaintiff was a public employee or whether that employee's rights were as full and detailed as those available to Maryland public employees. In sum, despite their best efforts Respondents have utterly failed to demonstrate that even the decisions of the lower courts,

[10] All of the other cases listed in Respondents' Appendix involve either private rather than public employees, *See, e.g. Ingram v. Steven Robert Corp.,* 547 F.2d 1260 (5th Cir. 1977); *Tyler v. Reynolds Metal Co.,* 600 F.2d 232 (9th Cir. 1979); *Morton v. Georgia Pacific Corp.,* 568 F.2d 58 (8th Cir. 1977); *Movement for Opportunity & Equality v. General Motors Corp.,* 622 F.2d 1235 (7th Cir. 1980), or do not involve employment discrimination disputes at all. *See e.g., Williams v. Walsh,* 558 F.2d 667 (2d. Cir. 1977) (termination) *Skung v. Anderson,* 452 F.2d 632 (9th Cir. 1971) (illegal search); *Warren v. Norman Realty Co.,* 513 F.2d 730 (8th Cir. 1975).

let alone those of this Court, require the conclusion that the Maryland statute is simply too short to be consistent with § 1983 and its policies.[11]

[11] Respondents final argument is that even if the trial court were correct that Art. 49B provides the appropriate limitations period, it should not have applied that limitation to this case because a three-year statute of limitations was "settled precedent" in Maryland (Respondents' Brief at 55-58). Reliance on *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971) in support of this proposition is totally misplaced. *Chevron Oil* provides that if during the pendency of an action, *this* Court establishes a new rule, that was clearly unforseeable or overrules a consistent line of cases, and this change prejudices a party, the rule will not, under certain circumstances, be given retroactive application. Here no consistent line of cases has been overruled and nothing unforseeable would occur if the Fourth Circuit decisions were reversed. *See e.g. Burns v. Sullivan*, 619 F.2d 99 (1st Cir.) *cert. denied*, 449 U.S. 893 (1980) where the court declined to upset a decision applying a six month limitations period in a § 1983 action. Respondents' authority shows only that in the past, some U.S. district courts had accepted the three year limitations period without discussion. It is improbable, in fact, that these decisions would have discussed Art. 49B as the appropriate limitations period because only two of the cases cited are employment discrimination cases and neither involves a public employee. Finally, Respondents were not the first to have their action barred by the Art. 49B limitations. At the time this case was decided, the Maryland District Court had applied the six-month period of that statute in at least four cases: *Lay v. Bethlehem Steel*, 542 F. Supp. 9 (D. Md.) *aff'd*, on other grounds, 681 F.2d 814 (4th Cir.), *cert. denied*, 103 S. Ct. 497 (1982); *McKee v. SCM Corp.*, No. R-79-162 (D. Md., Jan. 29, 1982) (unpubl.); *Brice v. Crown, Cork & Seal Co.*, No. H-78-1207 (D. Md. Jan. 15, 1982) (oral opinion) and *McGill v. General Electric Co.*, 524 F. Supp. 1126 (D. Md. 1981).

CONCLUSION

The Respondent employees used § 1983 to challenge discharges from public employment that they assert were racially based. Maryland's fair employment practices act which requires prompt filing of such complaints is the state statute most analogous to their cause of action. The statute of limitations governing it is neither "too short" nor insufficiently "judicial." The lower court erred when it declined to adopt Maryland's six month limitation period. Its judgment should be reversed.

Respectfully submitted,

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No. 83-264

Office - Supreme Court, U.S.
FILED
FEB 22 1984
L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

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—v.—

JAMES R. GRATTAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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TABLE OF CONTENTS

Interest of Amicus.....1

Statement of the Case.....2

Summary of Argument.....6

Argument.....8

THE SIX MONTH ADMINISTRATIVE COMPLAINT LIMITATION PERIOD FOUND IN MARYLAND LAW IS NOT THE MOST ANALOGUS STATE LIMITATION PERIOD FOR SECTIONS 1981, 1983 AND 1985 CASES.....8

A. Nonjudicial Adminstrative Complaint Periods Are Not An Appropriate Model For Federal Civil Rights Limitations Periods.....10

B. This Court's Decision in Patsy v. State Board of Regents of the Decision Below Requires Affirmance.....20

Conclusion.....26

TABLE OF CASES

Banach v. State Commission on Human Relations, 356 A. 2d 242 (Md. Ct. of App. 1976).....16

Burns v. Sullivan, 619 F. 2d 99 (1st Cir.1980).....21, 24

Chambers v. Omaha Public School District, 536 F. 2d 222 (8th Cir. 1976).....12

Chardon v. Soto, 51 U.S.L.W. 4832 (June 20, 1983).....9

Childers v. Indiana School District No. 1 of Bryan County, 676 F. 2d 1338 (10th Cir. 1982).....13

David v. Krouse, 478 F.Supp. 823 (E.D.N.Y. 1979).....14

DelCostello v. International Brotherhood of Teamsters, 51 U.S.L.W. 4693 (June 8, 1983).....9

Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970).....23

Griffin v. Breckenridge, 403 U.S. 88 (1971).....18

Holden v. Commission Against Discrimination, 671 F. 2d 30 (1st Cir. 1982).....24

McNutt v. Duke Precision Dental and Orthodontic Laboratories, 698 F. 2d 676 (4th Cir. 1983).....4, 5, 10, 17

Mitchum v. Foster, 407 U.S. 225 (1972).....17

Occidental Life Insurance Company v. EEOC, 432 U.S. 355 (1977).....16

Patsy v. Board of Regents, 475 U.S. ___, 73 L. Ed. 2d 172 (1982).....passim

Pauk v. Board of Trustees of the City University of New York, 654 F. 2d 846 (2d Cir. 1981).....18

Pennhurst State School and Hospital v. Halderman, No. 81-2101, 52 U.S.L.W. 4155 (1984).....2

Regan v. Sullivan, 557 F. 2d 300 (2d Cir. 1977).....14

Sethy v. Alameda County Water District, 545 F. 1157 (9th Cir. 1976).....13

Shouse v. Pierce County, 559 F. 2d 1142 (9th Cir. 1977).....13

Waters v. Wisconsin Steel Workers, 427 F. 2d 476 (7th Cir. 1970).....11, 12

INTEREST OF AMICUS*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 250,000 members, dedicated to protecting the civil rights and liberties of Americans. Since 1920, one of its constant concerns has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. § 1983 in remedying the violations of federal civil rights and deterring departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of § 1983 in enforcing fidelity to the constitutional

* Letters of consent from all parties to the filing of this brief have been lodged with the Clerk of the Court.

obligations of state officials entrusted with public power.

STATEMENT OF THE CASE

This action was brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985 and 1986 and Article 23 of the Maryland Declaration of Rights.[1] The plaintiffs were state employees of Coppin State College, a public institution of higher education operated by the State of Maryland, who were discharged from their positions in June, 1976. Defendants are the president of the college, the vice president of student affairs, and the chairman and executive director of the board of trustees. The plaintiffs allege that the defendants discriminated against them by

[1] Since no final judgment has been rendered in this case, this Court need not address the question whether Pennhurst State School and Hospital v. Halderman, No. 81-2101, 52 U.S.L.W. 4155 (1984), bars adjudication of the pendent state claim by the federal court to which defendants removed this case. See Patsy v. Board of Regents, 457 U.S. ___, 73 L. Ed. 2d 172, 187 n. 19 (1982).

firing them because of their race (they were white employees in the predominantly black school); plaintiff Adrienne Hedman also alleges that she was discriminated on the basis of her sex.

Plaintiffs filed claims of race and sex discrimination with the E.E.O.C. immediately after learning of their pending termination in June, 1976. While these claims were pending, they filed suit in state court on February 17, 1977, charging that their dismissals were arbitrary, capricious, and without basis in law and fact. In October, 1981, they filed an amended complaint, adding claims of race and sex discrimination under Sections 1981 and 1983. That action was removed by the state defendants from state to federal court. Thereafter, the defendants filed a motion to dismiss the action on statute of limitations grounds, claiming that the appropriate limitations period was the

six-month period for administrative complaints provided for in Md. Ann. Code, Article 49B.

The district court granted the motion to dismiss. On appeal, the Court of Appeals for the Fourth Circuit reversed. It noted that it was necessary to "look to Maryland law to borrow the limitations period for the most analogous state action." 710 F. 2d at 162. The choices available to the Court were: (1) the six month period prescribed in Article 49B, which the district court had accepted; (2) a five-and-a-half-month period derived from various provisions in Md. Ann. Code. Article 64A, § 33, and Rules of the Maryland Court of Appeals; and (3) the three year residual period in Md. Ann. Code, Courts and Proceedings, § 5-101.

The Court of Appeals rejected the six-month period found in Art. 49A on the basis of its previous opinion in McNutt v. Duke

Precision Dental and Orthodontic Laboratories, 698 F. 2d 676 (4th Cir. 1983), which had identified the shortcomings of the administrative period prescribed in Art. 49B:

> We reasoned that while such a short period might suffice to present an informal complaint which could then be fleshed out by the Commission, it was an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court, and that for this reason it was unlikely the Maryland legislature intended that this limitations period apply to civil actions.
> 710 F. 2d at 162

The Court of Appeals also found the provisions of Art. 64A inadequate as a model for adopting a Section 1981 and 1983 limitations period:

> We think it even less likely that the Maryland legislature intended that the limitations period defendants derive from Article 64A and related sources be applied to civil actions for discrimination. That period is even shorter than the period considered in McNutt. A proceedings under Article 64A is an administrative proceeding and the largest part of it -- 130 of the total of 165 days -- is spent formally adjudicating a claim initiated by the state.

The Court of Appeals properly recognized that the burden on the state in such a proceeding was far different from the burden on an individual litigant in an affirmative action under § 1983. Thus, even if the state

> legislature thought this adequate time to resolve a termination dispute in which the state must frame the issues and bear the burden of proof, [that fact] hardly evidence[s] an intent to impose a similar limit on the time in which an employee who is discharged may employ counsel who will investigate the termination and prepare a complaint. Indeed, under Maryland law a disgruntled employee, after proceedings under Article 64A are concluded, may turn to the State Human Relations Commission for relief from discrimination. Md. Ann. Code, Article 49B, § 7(b)(1). This, too, indicates that the Maryland legislature did not intend that the passing of a 165-day period should bar an employee from seeking administrative or judicial relief for discriminatory termination.
> 710 F. 2d at 162-64.

SUMMARY OF ARGUMENT

This case presents essentially a question of state law. The Court of Appeals, like nearly all the lower federal courts, rejected administrative complaint limitations

periods as the most analogous statute of limitations for civil rights actions brought under Sections 1981 and 1983. It did so based on its belief that the state legislature and the state courts would have done so. It reasoned that the administrative complaint period is short because it is generally used merely to file an informal complaint with a state board to trigger an investigation, and thus a short period is all that is required. Yet such a short period is not necessarily the appropriate time for investigating and preparing a full plenary judicial action. The purpose of the administrative scheme is different from a full adversary judicial action. It is used for informal conciliation and possible settlement. Furthermore, adopting the administrative limitations period would restrict the full scope of the civil rights laws. Finally, adopting the administrative

period would encourage the filing of more civil rights cases before any effective effort could be made to seek conciliation at the state level. This would perversely increase the number of federal civil rights cases, whereas a longer limitations period might well permit the resolution of many such claims within the state administrative scheme.

ARGUMENT

THE SIX MONTH ADMINISTRATIVE COMPLAINT LIMITATIONS PERIOD FOUND IN MARYLAND LAW IS NOT THE MOST ANALOGOUS STATE LIMITATIONS PERIOD FOR SECTIONS 1981, 1983 AND 1985 CASES

We start with the basic proposition that under Section 1988, a federal court is compelled to look to the most analogous state statute of limitations to determine the limitations period for an action brought under Sections 1981, 1983 and 1985. Although certain other federal causes of action may

borrow federal limitations periods, e.g., DelCostello v. International Brotherhood of Teamsters, 51 U.S.L.W. 4693, 4695 (June 8, 1983) (cause of action for breach of duty of fair representation borrows limitations period from N.L.R.B. Sect. 10(b)), the congressional directive expressed in Section 1988 requires initial consideration of state limitations periods for a civil rights case. See Chardon v. Soto, 51 U.S.L.W. 4832 (June 20, 1983). Petitioners do not argue to the contrary.

Thus the principal issue in this case is whether the six month period specified in Md. Ann. Code, Art. 49B is the analogous state statute to be applied in this case.[2] Since

[2] If the six month statute is the most analogous statute, the Court must also decide whether it is otherwise not suited to accomplishment of the purposes of § 1983. Although amicus addresses principally the first question herein, we agree with respondents that the six month period is indeed so ill-suited to the purposes of § 1983 that it may not be borrowed under §1988.

it appears that the only viable alternative to Art. 49B is the three year residual period in Md. Ann. Code § 5-101, elimination of the administrative limitations period found in Art. 49B (and the comparable provisions in Art. 64A) would require affirmance of the decision below.

A. Nonjudicial Administrative Complaint Periods Are Not An Appropriate Model For Federal Civil Rights Limitations Periods

It has been the almost universal rule in the lower federal courts that limitations periods for filing administrative complaints with state administrative boards are not to be borrowed by federal courts in determining the applicable federal limitations period for civil rights actions. As Judge Haynsworth noted in McNutt v. Duke Precision and Dental and Orthodontic Laboratories, supra, 698 F. 2d at 678, "The majority of lower federal courts have held that a statutory limitation upon the initiation of administrative

proceedings is not applicable to a judicial action to enforce a civil right derived from the Civil Rights Act of 1864."[3] Only the First Circuit seems ever to have taken a contrary view, and it has now joined the majority, as explained below in Point I B.

The reason for such a rule was explained by the Seventh Circuit in Waters v. Wisconsin Steel Works, 427 F. 2d 476, 488 (7th Cir. 1970), a case involving a 120-day period of limitations for filing discrimination claims with the Illinois Fair Employment Practices Commission. The Court concluded that the period for filing such a charge could not serve as the borrowed limitations period for § 1981 or 1983 claims:

> We are not convinced that the Illinois F.E.P.A. is the most analogous state action under these provisions. The Illinois act provides only for an administrative remedy and review of the

[3] Judge Haynsworth cited numerous cases in support of this proposition. See id. at n. 3.

F.E.P.C.'s findings in the state courts. Different considerations obviously apply to suits by private litigants in courts of law. In contrast to the Illinois F.E.P.A., the entire burden of investigating and developing a case under section 1981 lies with the private litigant. Furthermore, the short limitations period contained in the Illinois act is designed to encourage conciliation and private settlement. When an aggrieved party seeks court relief, conciliation has generally failed.

The Eighth Circuit came to the same conclusion in rejecting a 180-day administrative complaint procedure under Nebraska law as the limitations period for a Section 1981 and 1983 claim. See Chambers v. Omaha Public School District, 536 F. 2d 222 (8th Cir. 1976). The court compared the Nebraska administrative procedures with the Illinois procedures in the Waters case and found them similarly inapplicable to plenary federal actions under the civil rights statutes:

> Each of the statutes vests substantial authority in the respective administrative agencies to order

> affirmative remedial steps to eliminate the effects of the discriminatory employment practices. Ill. Rev. Stat. ch. 48, § 858 (1969), as amended, P.A. 79-465 (1975); Neb. Rev. Stat. § 48-1119(3). Both agencies possess the authority to compel testimony through the issuance of subpoenas in order to fulfill their statutory obligation to investigate and conciliate discrimination complaints. However pervasive the authority of these F.E.P.A. established agencies may be, we do not think that the procedures and remedies which are administratively available pursuant to the F.E.P.A. can be equated with the plenary judicial powers available in § 1981 and § 1983 actions. We hold that the F.E.P.A. period of limitation cannot be applied in the present case.
> Id. at 226-27.

Both the Ninth and Tenth Circuits have reached similar conclusions for similar reasons. See Sethy v. Alameda County Water District, 545 F. 2d 1157, 1162 (9th Cir., 1976) (en banc); Shouse v. Pierce County, 559 F. 2d 1142, 1146 (9th Cir. 1977); and Childers v. Indiana School District No. 1 of Bryan County, 676 F. 2d 1338, 1343 (10th Cir. 1982).

For the same reasons, the lower federal courts have almost uniformly rejected as the applicable limitations period "notice of claim" requirements under state law, whereby a county or municipality must receive notice before a plenary action can be filed in state court. See, e.g., David v. Krouse, 478 F. Supp. 823, 825 (E.D.N.Y. 1979).

By the same token, where a state statute of limitations against a state employee or a political subdivision is keyed to indemnification requirements under state law or to the protection of sureties who may be standing behind the governmental employer, federal courts do not borrow the limitations period since they do not serve the same function in a federal action. See, e.g., Regan v. Sullivan, 557 F. 2d 300, 307 (2d Cir. 1977) (Bivens cause of action would not apply state limitations periods for different law enforcement personnel under state law).

The relevant considerations in all of these cases is (1) what burden is placed upon the complainant or plaintiff under the state procedure which is being cited as a model for the federal cause of action; (2) what is the purpose of the state procedure; (3) will the application of the state administrative complaint or notice procedure advance the interests behind the federal cause of action; and (4) will the application of the state administrative limitations period increase or decrease the volume of litigation in the federal courts.

Based on these criteria, there is no basis whatsoever for applying the six month administrative complaint procedure under Art. 49B, as the Court of Appeals properly held.

(1) Burden on plaintiff. The Fourth Circuit noted the different burdens placed on a plaintiff under the state procedure where only an "informal complaint" need be

presented which could be "fleshed out by the Commission." 710 F. 2d at 162. By contrast, the six month period might well be "an inadequate time in which to prepare a formal complaint suitable for adversary proceedings in federal court."

(2) The State Purpose. The purpose of the procedures under Art. 49B is to allow the state Commission on Human Relations to start a preliminary investigation "to satisfy itself as to the reliability of the information received from an individual, before issuing a complaint," Banach v. State Commission on Human Relations, 356 A. 2d 242, 249 (Md. Ct. of App. 1976). Thus, the six month period is not a true statute of limitations even as to the Commission itself, which may take considerably more time before it actually commences a formal adjudicatory proceeding. See Occidental Life Insurance Company v. EEOC, 432 U.S. 355 (1977). If the

six-month period is not a true limitations period for the Commission, how can it act as the model for a limitations period for the individual who filed the complaint to begin the procedures? As the Fourth Circuit held in McNutt, supra, the Art. 49B procedure is designed to eliminate the discrimination "by conference, conciliation and persuasion." If that is to be effective, "claims must be fresh." 698 F. 2d at 679. Under Sections 1981 and 1983, however, there is no such mandatory conciliation scheme or purpose.

(3) Federal interests behind the civil rights law. This Court has consistently emphasized the broad sweep of the civil rights statutes which create "a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation," Mitchum v. Foster, 407 U.S. 225, 239 (1972). The law must be accorded a "sweep as

broad as its language," Griffin v. Breckenridge, 403 U.S. 88, 97 (1971). It is thus inappropriate to chose as the model for a limitations period a state law that has a far different and more restrictive -- indeed, partially conflicting -- purpose. As the Second Circuit said in Pauk v. Board of Trustees of the City University of New York, 654 F. 2d 856, (2d Cir. 1981): "It would be anomalous for a federal court to apply a state policy restricting remedies against public officials to a federal statute that is designed to augment remedies against those officials, especially a federal statute that affords remedies for the protection of constitutional rights."

(4) Limitation on litigation. Another consideration is the effect of choosing a shorter limitations period for the filing of administrative complaints on the volume of litigation in the federal courts. If this

Court were to decide that an administrative complaint period is the appropriate limitations period for Section 1981 and Section 1983 cases, there would be no point for any complaint to utilize the conciliation procedures provided for in state law. The controversy could not be settled by informal discussion and efforts at settlement. Every complainant would be required to bring a federal action in the shortest possible time without making any effort to work out a solution through the state procedures. Otherwise he would be time barred. The very rush to the federal courthouse which this Court has condemned on numerous occasions would be encouraged. That is surely not the appropriate solution to the flood of litigation in the federal courts.

For all these reasons, Art. 49B cannot be selected as the appropriate limitations period.

B. This Court's Decision in Patsy v. State Board of Regents Requires Affirmance of the Decision Below

Another reason why Art. 49B should not be selected as the appropriate limitations model is that this Court rejected any requirement of administrative exhaustion in Section 1983 cases in its recent decision in Patsy v. State Board of Regents, supra. Simply put, if a federal civil rights litigant need not follow the administrative scheme outlined under state law before he can go into federal court, he should not be required to follow the limitations period established by that same state administrative scheme. Otherwise, the administrative procedures would continue to act as a

limitation upon the full exercise of the federal right.

The relation between administrative exhaustion and administrative limitations period was noted by the First Circuit in Burns v. Sullivan, 619 F. 2d 99 (1st Cir. 1980). In that case, a white policeman, claiming that he had been passed over for promotion allegedly because of his race, he brought an action in federal court under Sections 1983 and 1985(3). He had waited almost three years from the time of the allegedly discriminatory action before commencing suit. The First Circuit noted that under Massachusetts law, the plaintiff could have appealed the adverse personnel action directly to the civil service commission within 30 days of the adverse action. The 30 day period was considered too short as a borrowing period for the Section 1983 action. In addition, a second avenue

open to the plaintiff was the filing of a complaint of racial discrimination with the Massachusetts Commission against Discrimination, an agency which investigates and may take corrective action. Judicial review of the Commission's action was available by appeal to the Massachusetts Superior Court.

The First Circuit found that the six month administrative complaint procedure was the most analogous limitations period for the federal civil rights causes of action. It reasoned that "if the plaintiff is required to exhaust his state administrative remedies ... his case will already have been prepared, and with little, if any, modification can easily be filed within six months of the decision of the state agency." 619 F. 2d at 106-07.

In short, the First Circuit assumed that a plaintiff did have to exhaust his

administrative remedies. Therefore he would have prepared his case for the administrative scheme within the six month period and that preparation would have allowed him to jump into federal court within the same time frame. Indeed, the First Circuit went on to describe various policy reasons in favor of administrative exhaustion, all of which were later rejected by this Court in Patsy:

> There are important policy reasons for using the time limitations of a state statute that protects the same rights the plaintiff seeks to vindicate by resort to the federal Civil Rights Acts. Assuming no requirement of exhaustion, a rule providing a three-year statute of limitations will allow state employees to bide their time and use the federal courts, bypassing the state administrative proceedings. Two unfortunate results will follow. First, the general government policy, observed at both the state and federal levels, of prompt resolution of personnel disputes, will be thwarted. Second, without any showing that state administrative procedures will not provide the plaintiff with due process and protect against constitutional violations, see Eisen v. Eastman, 421 F. 2d 560, 569 (2d Cir. 1969), cert. denied, 400 U.S. 841 (1970), the federal courts will become surrogate state personnel departments.
> 619 F. 2d at 107.

Since administrative exhaustion is not required, the considerations noted by the First Circuit simply do not apply, and its reasons for following the six month administrative limitations period disappear. Indeed, in a later case, the First Circuit acknowledged that "the unavailability of the state administrative remedies does tend to vitiate the policies we observed in Burns, 619 F. 2d at 107, that underlie application of the state statute of limitations to Civil Rights Acts claims." Holden v. Commission Against Discrimination, 671 F. 2d 30, 33 (1st Cir. 1982) (reaching same result as in Burns but under different reasoning, namely, the presence of a six month judicial statute of limitations).

If, under Patsy, administrative exhaustion is not necessary, the application of any administrative complaint period would seem inappropriate. There is no reason or

incentive for an individual to limit his federal action by the time period under the administrative scheme. It is an irrelevancy so far as the requirements of the federal suit concerned. The law enacted by Congress entitles him to bypass it completely. If, however, exhaustion is to be encouraged -- which Patsy certainly does not forbid -- the shorter limitations period for administrative relief must not be adopted as the judicial limit. Otherwise, the federal suit would have to be filed and would interrupt any administrative proceedings freely undergone by plaintiffs.

In short, the only Circuit that adopted a administrative complaint period as the borrowed limitations period for a Section 1981 and 1983 case did so based on its understanding that administrative exhaustion is required for such actions, a judgment rejected by this Court. The impressive

unanimity with which the Courts of Appeals have rejected administrative limitations period in § 1983 actions is eloquent testimony to the correctness of that judgment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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February 20, 1984

Office - Supreme Court, U.S.
FILED
JAN 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-264

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PETITIONERS,

v.

JAMES R. GRATTAN and ADRIENNE S. HEDMAN

ON WRIT OF CERTIORARI TO THE
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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 7

ARGUMENT

I. THERE IS WIDESPREAD CONFUSION AMONG THE LOWER COURTS CONCERNING THE METHODOLOGY FOR ANALYZING AND DECIDING §1983 STATUTE OF LIMITATIONS QUESTIONS 10

II. THE PRIOR DECISIONS OF THIS COURT PROVIDE A METHODOLOGY FOR CHOOSING STATE LIMITATION PERIODS IN FEDERAL CIVIL RIGHTS CASES 16

A. Choosing the Analogous State Cause Of Action And Applicable Limitation Period 18

B. Measuring Consistency With Federal Policies 24

C. Suggested Methodology For Choosing The Applicable State Statute Of Limitations 34

III. THE STATUTORY LIMITATION PERIOD APPLIED BY THE TRIAL COURT IN THE CASE AT BAR IS MOST CLEARLY ANALOGOUS TO THE PLAINTIFFS' CAUSE OF ACTION

AND IS CONSISTENT WITH
THE CONSTITUTION AND LAWS
OF THE UNITED STATES 38

CONCLUSION. 46

TABLE OF AUTHORITIES

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Auto Workers v. Hoosier Corp., 383
U.S. 696, 86 S.Ct. 1107, 16
L.Ed.2d 192 (1966) 17

Board of County Commissioners v.
United States, 308 U.S. 343,
60 S.Ct. 285, 84 L.Ed. 313
(1939). 34

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U.S. 478, 100 S.Ct. 1790,
64 L.Ed.2d 440 (1980) 6,12,18,
20,25,27,
34, 35,39,44

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(1st Cir. 1980), cert. denied,
449 U.S. 893, 101 S.Ct. 256,
66 L.Ed.2d 121 (1980). 22,35

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610, 15 S.Ct. 217, 39 L.Ed.
280 (1895) 17,27,28,
29,32,36,41

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98 S.Ct. 1042, 55 L.Ed.2d
252 (1978) 19

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Corp., 684 F.2d 187 (1st Cir. 1982) 22

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Cherry v. Vanlahai, 216 Kan. 195, 531 P.2d 66 (1975) 23

Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983) 21

Condrey v. City of Eastborough, Kansas, No. 80-1513 (10th Cir.) 3

Cooper v. Hutchinson Police Department, 6 Kan. App.2d 806, 636 P.2d 184 (1981). 4

Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947). 17

Curran v. Portland Sch. Committee, Etc., 435 F.Supp. 1063 (D.Me. 1977) 43

Dewey v. University of New Hampshire, 694 F.2d 1, (1st Cir. 1982), cert. denied, 103 S.Ct. 2121 (1982). 22

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Kansas, 233 Kan. 995, 667 P.2d 879 (1983). 4,22, 23

Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983). 15

Grattan v. Burnett, 710 F.2d 160 (4th Cir. 1983) 39

Hamilton v. City of Overland Park, Kansas, No. 83-1593 (10th Cir.) 3

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McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983) 38

Miller v. City of Overland Park, 231 Kan. 557, 646 P.2d 1114 (1982) 4,21,23

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K.S.A. 12-1610e 2

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Md. Ann. Code Article 49B, §9(a) . . 9,39, 41,42

Md. Ann. Code Article 64A, §33 . . . 41,42

Code of Maryland Regulations §06.01.01.60 42

28 U.S.C. §1652 27,28

42 U.S.C. §1981 11,16,43

42 U.S. §1983. . . . . 1,2,3,4, 5,6,7,8, 10,11,13,14, 15,16,17,18, 19,20,21,22, 24,25,26,34, 35,36,37,39, 42,43,45

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24,27,33,41

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(Title VII of the Civil
Rights Act of 1964). 9,43
44,46

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(1979) 13,14

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L.Rev. 1011 (1980) 13,33

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Litigation, 1976 Ariz. St.
L.J. 97 (1976). 13,20

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PETITIONERS,

v.

JAMES R. GRATTAN and ADRIENNE S. HEDMAN

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LEAGUE OF KANSAS MUNICIPALITIES IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

Since the Court's decision in Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), Kansas municipalities have increasingly found themselves defendants in lawsuits brought under 42 U.S.C. §1983.

One of the questions of law that commonly arises in such cases involves the selection of the applicable state statute of limitations to apply to the §1983 cause of action. This occurs in §1983 cases due to the absence of a federal limitations period for such actions and the command of 42 U.S.C. §1988 to apply the law of the states in such instances "so far as the same is not inconsistent with the Constitution and laws of the United States."

The League of Kansas Municipalities is a statutorily recognized instrumentality of its over 500 member cities. K.S.A. 12-1610e. It files this brief amicus curiae in support of the position of the State of Maryland in the case at bar that the civil rights claims of the plaintiffs were time barred by Maryland state law. Further, due to the increasing frequency with which Kansas cities are defending

§1983 actions since Monell, supra, amicus wishes to respectfully offer a suggested methodology for the Court's consideration for analyzing statute of limitations questions in future federal civil rights cases.

The statute of limitations question has arisen in three §1983 cases involving Kansas cities that were recently consolidated with a number of other cases for review and hearing en banc by the United States Circuit Court of Appeals for the Tenth Circuit. Condrey v. City of Eastborough, Kansas, No. 80-1513; Pike v. City of Mission, Kansas, Nos. 82-1245 and 82-1344; and Hamilton v. City of Overland Park, Kansas, No. 83-1593. The Tenth Circuit consolidated these cases for the specific purpose of developing a consistent methodology for analyzing §1983 statute of limitations questions. The

federal district court judges for the District of Kansas are currently divided on this question as well.

The Kansas Supreme Court and Court of Appeals have rendered opinions on the statute of limitations question on a number of occasions in recent years. Cooper v. Hutchinson Police Department, 6 Kan. App. 2d 806, 636 P.2d 184 (1981); Miller v. City of Overland Park, 231 Kan. 557, 646 P.2d 1114 (1982); and, most recently, Dutoit v. Board of County Commissioners of Johnson County, Kansas, 233 Kan. 995, 667 P.2d 879 (1983) (hereinafter referred to as Dutoit).

The League of Kansas Municipalities participated as amicus curiae in the Dutoit case in which the Kansas Supreme Court rejected the application of a specific state thirty-day period of limitation to a §1983 claim challenging the con-

stitutionality of special assessments. The Court opted instead for a two-year general statute of limitations (K.S.A. 60-513(a)) because "[a] thirty-day limitation period is not sufficiently generous to preserve the remedial spirit of 42 U.S.C. §1983 (Supp. V. 1983)." Id. at 1006. This holding, with which amicus strongly disagreed, was rendered despite decades of Kansas case law indicating that actions challenging special assessments brought under state law alleged the same federal constitutional cause of action as a cause of action asserted under §1983.

During the 1984 Kansas legislative session, amicus will be requesting enactment of a specific state statute of limitations for §1983 actions challenging special assessments. Absent some clearer direction from the Court on how §1983

statute of limitations questions can be resolved, it will be most difficult to advise the Kansas legislative on what might be viewed as an acceptable limitation period.

The Court recently referred to the evolving definition and uncertain contours of municipal liability under §1983. Newport v. Facts Concerts, Inc., 453 U.S. 247, 256, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Surely one of the greatest areas of uncertainty in §1983 litigation involving municipalities is the applicable state statute of limitations question. While amicus wholeheartedly agrees that §1988 by its very terms precludes nationwide uniformity in §1983 limitation periods, Board of Regents v. Tomanio, 446 U.S. 478, 489, 100 S.Ct. 1790, 64 L.Ed.2d 440, (1980) (hereinafter referred to as Tomanio), it is patently

clear that the lower courts need additional guidance and direction in deciding such questions.

SUMMARY OF ARGUMENT

Jurists, legal scholars, and civil rights litigants alike generally agree that there is disarray in the approaches employed by many lower courts in choosing state limitation periods to apply to §1983 and other federal civil rights actions. The case at bar presents a timely opportunity for the Court to provide needed additional guidance in analyzing and deciding such questions.

Decisions by the Court extending back over 100 years provide a useful and workable model for analyzing §1983 statute of limitations questions. In the absence of a statute of limitations specifically for federal civil rights

claims, these cases require courts to identify the state common law or statutory cause of action that is most analogous to the cause of action asserted under §1983. The statute of limitations governing the most analogous state cause of action should then be applied unless it is found to be inconsistent with the Constitution and laws of the United States.

A state statute of limitations should be treated as inconsistent if it either (1) discriminates against the federal cause of action, or (2) after consideration of all the relevant circumstances, the limitation period fails to afford a reasonable period in which to assert the plaintiff's §1983 cause of action. Circumstances relevant to the latter inquiry include the policies underlying §1983 and the state limitation period and the plaintiff's actual

assertion of the federally protected right within the applicable state limitation period.

Utilization of this methodology to analyze the state limitation period applied by the trial court to the plaintiffs' civil rights actions in the case at bar indicates that the Fourth Circuit erred when it reversed the trial court's decision on the statute of limitations question. Application of the six-month limitation period in Md. Ann. Code Article 49B, §9(a), does not discriminate against the federal cause of action. On the contrary, it puts the federal cause of action on equal footing with its state law analogue.

The timely filing of the plaintiffs' Title VII claims within the federal six-month limitation period initially demonstrates the reasonableness of the period

selected by the trial court. The state policies of repose underlying the state limitation period of promoting the prompt assertion and resolution of employment discrimination claims further supports the conclusion that the six-month limitation period was reasonable under the circumstances. Therefore, application of the six-month statutory limitation period was indeed consistent with the Constitution and laws of the United States.

ARGUMENT

I. THERE IS WIDESPREAD CONFUSION AMONG THE LOWER COURTS CONCERNING THE METHODOLOGY FOR ANALYZING AND DECIDING §1983 STATUTE OF LIMITATIONS QUESTIONS.

In a number of its recent federal civil rights cases the Court has consistently concluded that 42 U.S.C.

§§1981 and 1983[1] contain neither specific statutes of limitations nor rules relating to tolling, and 42 U.S.C. §1988 requires that such rules of decision be borrowed from state law unless a rule is "inconsistent with the Constitution and laws of the United States." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (hereinafter referred to as Johnson); Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) (hereinafter referred to as Robertson); Tomanio, supra; and Chardon v. Fumero Soto, _____ U.S. _____, 103 S.Ct. 2611, 77 L.Ed.2d 74 (1983) (hereinafter referred

[1]For purposes of brevity, reference will usually be made throughout this brief to only §1983 statute of limitations questions, although the same principles usually apply to §1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975).

to as Chardon). While the Court has clearly directed that such an approach should be followed, additional guidance for deciding such sensitive questions is in order.

Lower courts have been instructed variously to borrow "the state law of limitations governing an analogous cause of action," Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447, to "adopt the local law of limitation, Runyon v. McCrary, 427 U.S. 160, 180, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976), and that "the controlling period would ordinarily be the most appropriate one provided by state law." Johnson, 421 U.S. at 462, 95 S.Ct. at 1721. Despite these and other emphatic statements of the Court's general policy regarding the use of and deference to be accorded to state law in judging the timeliness of federal civil rights actions, the absence

of a systematic method for deciding such questions has led to conflicts between and within the United States Circuit Courts of Appeals, resulting in considerable uncertainty for civil rights litigants.

The now legendary §1983 statute of limitations conflicts between the circuits are well-chronicled in various annotations and law review articles.[2] The essence of the §1983 statute of limitations dilemma facing federal and state courts has been accurately summarized by one commentator:

> The general rule that state statutes of limitations are ap-

[2]See Annot., 45 A.L.R. Fed. 548 (1979); Special Project, Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations, 65 Cornell L. Rev. 1011, 1072 (1980); and Comment, Statutes of Limitations in Federal Civil Rights Litigation, 1976 Ariz. St. L.J. 97 (1976).

> plicable to federal civil rights actions brought under 42 U.S.C. §1983 is a rule more easily stated than applied, and the choice of which statute of limitations of a particular state shall apply has been a difficult issue for the courts. Some courts, seeking to provide certainty to civil rights litigants in a particular state, have chosen one state statute of limitations in a state to govern all §1983 suits, while other courts have chosen instead different statutes of limitations of the same state in different §1983 cases, depending on the facts of the case.[3]

The uncertainty facing §1983 litigants concerning the applicable state statute of limitations is perhaps even more troubling when a consensus within any one circuit on the method for deciding such questions cannot be reached. This very problem exists at this time in the United States Court of Appeals for the

[3]Annot., supra, note 2, 45 A.L.R. Fed. at 553.

Tenth Circuit, and is evidenced by the sharply divided majority and dissenting opinions in Garcia v. University of Kansas, 702 F.2d 849 (10th Cir. 1983).

Due to this problem the Tenth Circuit recently consolidated a number of cases, including three cases involving Kansas cities (see Statement of Interest, p.3), and has held a hearing en banc for the purpose of developing a circuit-wide methodology for deciding §1983 statute of limitations questions. In her dissenting opinion in Garcia v. University of Kansas, Circuit Judge Seymour articulated the challenge facing the lower courts in undertaking such a task when she observed:

> Unfortunately, the Supreme Court has provided little guidance to the lower courts on how to choose a statute from among several state statutes of limitation, each of which governs a cause of action arguably anal-

> ogous to the section 1981 or section 1983 action at hand. . . Not surprisingly, this lack of guidance has resulted in diverse approaches among the circuits to the task of selecting a state limitation statute governing actions analogous to claims under section 1981 or section 1983. (Citations omitted.) Id. at 851.

Amicus respectfully submits that the case at bar presents an appropriate and timely opportunity for the Court to provide a clear methodological framework for the resolution of federal civil rights statute of limitations questions. Furthermore, the framework can be derived directly from the Court's prior decisions.

II. THE PRIOR DECISIONS OF THIS COURT PROVIDE A METHODOLOGY FOR CHOOSING STATE LIMITATION PERIODS IN FEDERAL CIVIL RIGHTS CASES.

As the Court indicated in Johnson, 421 U.S. at 462, 95 S.Ct. at 1721, the

"borrowing" of state statutes of limitations is necessary in order to determine the timeliness of federal civil rights actions as well as causes of action asserted pursuant to a number of other federal laws.[4] Consequently, in addition to its recent federal civil rights opinions, the Court has a rich heritage of decisions on such questions from which to draw.

A court is faced with two problems in choosing a state statute of limitations to apply to a §1983 cause of action. First, the court needs to characterize the §1983 cause of action and identify an

[4]See Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-704, 86 S.Ct. 1107, 16 L.Ed.2d 192 (1966) (Labor Management Relations Act); Cope v. Anderson, 331 U.S. 461, 67 S.Ct. 1340, 91 L.Ed. 1602 (1947) (National Bank Act); Chattanooga Foundry v. Atlanta, 203 U.S. 390, 27 S.Ct. 65, 51 L.Ed. 241 (1906) (Sherman Act); and Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895) (hereinafter referred to as Campbell) (Patent Act).

analogous cause of action along with its applicable limitation period. Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447. The second, and perhaps more perplexing, problem is to determine whether application of that limitation period would be "inconsistent" with the Constitution and laws of the United States.

A. Choosing The Analogous State Cause Of Action And Applicable Limitation Period.

"Borrowing" a state statute of limitation and related rules of repose for judging the timeliness of a §1983 action requires initially that a court characterize the plaintiff's §1983 cause of action. It is generally agreed that §1983 does not confer substantive rights, but rather is remedial in nature. Maine v. Thiboutot, 448, U.S. 1,4, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980); Monell v. Depart-

ment of Social Services, 436 U.S. at 700-701, 56 L.Ed.2d at 641; and Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). The §1983 remedy "broadly encompasses violations of federal statutory as well as constitutional law." Maine v. Thiboutot, 448 U.S. at 4, 65 L.Ed.2d at 559.

Section 1983 has been described as creating a "species of tort liability," Smith v. Wade, _____ U.S. _____, 103 S.Ct. 1625, 75 L.Ed.2d 632, 637 (1983). The common law of torts has provided the basis for the Court's decisions concerning damages and immunities available under §1983. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978); and Newport v. Fact Concerts, 453 U.S. at 258-259, 69 L.Ed.2d at 626-627.

Nonetheless, the Court has never adopted the tort characterization in even

a general way as the preferred or required approach to analyzing §1983 statute of limitations questions. On the contrary, it has left the lower courts free to "borrow" limitation periods based on analogous state causes of action. Tomanio, 446 U.S. at 483-484, 64 L.Ed.2d at 447. The wisdom of not requiring courts to analogize to state "tort" causes of action in all cases is evident from the very nature of the rights protected by §1983, including federal statutory as well as constitutional rights. At times there will be simply no common law tort cause of action analogous to a right secured by a federal statute or the Constitution.[5]

When the common law of torts does provide the most appropriate analogue,

[5]Comment, supra, note 2, 1976 Ariz. St.L.J. at 117-121, contains a thorough critique of simplistic tort analogies in civil rights cases.

the next question often is whether a general tort or a specific tort is the most analogous state cause of action. Clulow v. State of Oklahoma, 700 F.2d 1291 (10th Cir. 1983); and Miller v. City of Overland Park, supra. Questions also may arise concerning the scope of a specific common law tort. Runyon v. McCrary, 427 U.S. at 182, 96 S.Ct. at 2600.

In still other instances, such as in the case at bar, a state legislature will have created specific state statutory causes of action that are most analogous to the §1983 cause of action. The "borrowing" of the limitation period for statutory causes of action is directly supported by the text of §1988 which refers to reliance on "the common law, as modified and changed by the constitution and statutes of the state. . . so far as the same is not inconsistent with the Con-

stitution and laws of the United States." This statutory approach has been recognized by the U.S. Circuit Court of Appeals for the First Circuit in a series of opinions concerning §1983 claims similar to those in the case at bar.[6]

State law also may actually provide a right of action, remedy and statute of limitations for violations of federal rights. This was evident in a recent Kansas case, Dutoit, supra, in which the plaintiffs challenged special assessments

[6]Burns v. Sullivan, 619 F.2d 99 (1st Cir. 1980), cert. denied, 449 U.S. 893, 101 S.Ct. 256, 66 L.Ed.2d 121 (1980); Hussey v. Sullivan, 651 F.2d 74 (1st Cir. 1981); Holden v. Massachusetts Commission Against Discrimination, 671 F.2d 30 (1st Cir. 1982), cert. denied, 103 S.Ct. 97 (1982); Carter v. Supermarkets General Corp., 684 F.2d 187 (1st Cir. 1982); and Dewey v. University of New Hampshire, 694 F.2d 1 (1st Cir. 1982), cert. denied, 103 S.Ct. 2121 (1982). Accord, Warren v. Norman Realty Co., 513 F.2d 730 (8th Cir. 1975), cert. denied, 423 U.S. 855, 96 S.Ct. 105, 46 L.Ed.2d 81 (1975).

against their property as an unconstitutional "taking." Until recently, the Kansas Supreme Court had consistently held that strong state policy reasons required that such federal claims asserted under state law be brought within the thirty-day statutory limitation period. Cherry v. Vanlahai, 216 Kan. 195, 199, 531 P.2d 66 (1975).

Following the lead of the U.S. Circuit Court of Appeals for the Ninth Circuit in Shouse v. Pierce County, 559 F.2d 1142 (9th Cir. 1977), the Dutoit court selected a statute of limitations before it identified the most analogous cause of action that could be asserted under state law. This differed strongly from the methodology it used in Miller v. City of Overland Park, supra. These cases are representative of the many cases in which the lower courts have struggled with the

process of selecting a statute of limitations for §1983 claims due to a lack of direction from the U.S. Supreme Court.

One final category of "statutory" cases exists. In such cases certain state legislatures have provided a specific statute of limitations governing federal civil rights action. The one-year Tennessee statute of limitations applied by the Court in Johnson is representative of this type of statute. Id. at 456, n. 2, 95 S.Ct. at 1718.

B. **Measuring Consistency With Federal Policies.**

Selection of an analogous state cause of action and limitation period for a §1983 cause of action is only complete when the period under consideration, in the words of §1988, "is not inconsistent with the Constitution and laws of the United States." In a number of its recent

opinions involving §1983 statute of limitations questions, the Court has provided some guidance on when a limitation period may be "inconsistent" with federal policy.

In Robertson it was indicated that the §1983 policies of (1) preventing abuses of state power and (2) compensation of persons for violation of federal rights were the yardstick by which any state limitation period must be measured. Id. at 591, 56 L.Ed.2d at 561. The Court stated further that "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." Id. at 593, 56 L.Ed.2d at 563.

In Tomanio the Court restated the above principles from Robertson and further developed the framework for analyzing "inconsistency" when it observed that

"[i]n order to guage consistency, of course, the state and federal policies which the respective legislatures sought to foster must be identified and compared. On many prior occasions, we have emphasized the importance of the policies underlying state statutes of limitations." Id. at 487, 64 L.Ed.2d at 449. The Court went on to affirm that statutes of limitations "have long been respected as fundamental to a well-ordered judicial system. . . in general, state policies of repose cannot be said to be disfavored in federal law." Id. at 447-448, 64 L.Ed.2d at 449-450. Following the reasoning of the above cases, in Chardon, supra, the Court implicity approved the application of Puerto Rico's one-year statute of limitations to the petitioners' §1983 claims.

In Johnson, the Court explained the concept of "inconsistency" by reference not to §1988 but to a line of prior cases in which the Court had used the predecessor of the current Rules of Decision Act, 28 U.S.C. §1652, as the basis for borrowing state law when a gap existed in federal law. Id. at 462, 95 S.Ct. at 172.[7] The oldest of the cases cited, Campbell v. Haverhill, 155 U.S. 610, 15 S.Ct. 217, 39 L.Ed. 280 (1895), involved a patent infringement action brought in federal court. The trial court concluded that the state statute of limitations was required to be applied to the claim by the terms of the Rules of Decision Act and found that the federal claim was barred as a result.

The Supreme Court upheld the trial court's decision in Campbell, but it also

[7] Supra, note 4. Cited with approval in Tomanio, 446 U.S. at 484, n. 3, 64 L.Ed.2d 447.

concluded that the requirement to absorb state periods of limitation could be displaced if the statute discriminated against the exercise of a federal right. Id. at 615, 39 L.Ed. at 282. The Court found the basis for this discretion in the final words of the Rules of Decision Act, which still requires application of state laws "in cases where they apply." 28 U.S.C. §1652. The type of discrimination specifically mentioned by the Court would arise in cases in which a state limitation period applied to causes of action enforceable only in federal court, i.e., one year for patent infringement, "while the ordinary limitation of six years was applied to all other actions in tort." Id. at 615, 39 L.Ed. at 282.

In Campbell the Court also referred to a second basis for not applying a state

limitation period. "So, too, it has been held that the statutes of limitations must give a party a reasonable time to sue, and if a particular statute should fail to do so it would be within the competency of the courts to declare the same unconstitutional and void." [Citing Koshkonong v. Burton, 104 U.S. 668, 26 L.Ed. 886 (1881), and Wheeler v. Jackson, 137 U.S. 245, 34 L.Ed. 659 (1890]. This second prong of the Campbell Court's inconsistency analysis deserves attention due to its strong resemblance to the analysis employed by many courts, including the Fourth Circuit in the case at bar, in rejecting the specific state statutes of limitations that are suggested by the government defendants.

Both the cases cited in Campbell in support of the second prong of the Court's inconsistency analysis reflect the

Court's traditional approach to statutes of limitations that on their face appear "too short" to be consistent with federal policy. Koshkonong v. Burton involved an action to recover the amount due on municipal bonds, including interest. The plaintiff contended, and the lower court agreed, that the application of a six-year (and in some cases one-year) statute of limitations was an unconstitutional impairment of an obligation of contract.

In concluding differently than the lower court that the state statute of limitations was constitutional and could be given retroactive effect, the Court identified the constitutional limits on this state legislative power:

> It was, undoubtedly, within the constitutional power of the Legislature to require, as to existing causes of action, that suits for their enforcement should be barred unless brought within a period less than that

> prescribed at the time the contract was made or the liability incurred from which the cause of action arose. The exertion of this power is, of course, subject to the fundamental condition that a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of an action before the bar takes effect. (Citations omitted.) 104 U.S. at 675, 26 L.Ed. at 889. (Emphasis added.)

Nine years later in Wheeler v. Jackson the Court considered the constitutionality of a New York state statute of limitations which required a purchaser of tax delinquent properties in the City of Brooklyn to act within six months after the enactment of the statute to compel the execution or delivery of a lease. Citing Koshkonong v. Burton, supra, the Court restated the rule that "the Legislature may prescribe a limitation for the bringing of suits where none previously existed. . . provided, in each case, a

reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect." Id. at 255, 34 L.Ed. at 663. (Emphasis added.)[8] After examining the circumstances of the case, including the state policies underlying the six month limitation period, the Court concluded the law was constitutional.

Koshkonong v. Burton, Wheeler v. Jackson, and Campbell v. Haverhill pro-

[8]Quoting from another statute of limitations case, McGahey v. Virginia (Re Brown), 135 U.S. 662, 102 S.Ct. 972, 134 L.Ed. 304 (1889), the Court reaffirmed its commitment to nonuniformity in applying state limitation periods. "No one rule as to the length of time which will be deemed reasonable can be laid down for the government of all cases alike. Different circumstances will often require a different rule. What would be reasonable in one class of cases would be entirely unreasonable in another." Wheeler v. Jackson, 137 U.S. at 255, 134 L.Ed. at 663.

vide a sound basis for analyzing the consistency of a particular statute of limitations with "the Constitution and laws of the United States," as required by §1988. Under this methodology, a court should first inquire whether application of the limitation period under consideration would discriminate against a federal policy, i.e., is the period governing the federal cause of action shorter than that provided for asserting an analogous state cause of action? This question is particularly relevant in analyzing statutes enacted specifically for federal civil rights actions.[9]

Second, a court should determine whether, taking all the circumstances into consideration, the limitation period gives the plaintiff a reasonable time to

[9] Supra, note 2, 65 Cornell L.Rev. at 1049.

assert the federal cause of action under §1983. Based on Wheeler v. Jackson, two very relevant circumstances would include the plaintiff's prior knowledge of the governmental policy favoring repose and the state policies underlying the bar. Accord, Tomanio, 446 U.S. at 487, 64 L.Ed.2d at 449. Cf., Board of County Commissioners v. United States, 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313 (1939).

C. **Suggested Methodology For Choosing The Applicable State Statute Of Limitations.**

Based on the foregoing, amicus respectfully recommends consideration of the following general methodology for analyzing §1983 statute of limitations questions:

1. If the state has enacted a statute of limitations for federal civil rights claims, that statute should be utilized so long as it is not inconsis-

tent with the Constitution and laws of the United States. Johnson, supra.

2. If the state has not enacted a statute specifically for civil rights claims, the statute governing the most analogous state common law or statutory cause of action should be applied as long as it is not inconsistent with the Constitution and laws of the United States. Tomanio, and Burns v. Sullivan, supra.

3. If the §1983 cause of action is equally analogous to several state causes of action, the longer statute of limitations should be applied as long as it is not inconsistent with the Constitution and laws of the United States.

4. If the §1983 cause of action has literally no state common law or

statutory law analogue, or if application of the analogous cause of action would be inconsistent with the Constitution and laws of the United States, a "catch-all" statute should be utilized as long as it is not inconsistent with the Constitution and laws of the United States.

5. In determining the "inconsistency" of a limitation period with the Constitution and laws of the United States, a court should make two inquiries:

(a) Does the limitation period under consideration "discriminate" against the §1983 cause of action? Campbell v. Haverhill, supra; and

(b) Does the limitation period under consideration, taking all the circumstances into consid-

eration, give the plaintiff a reasonable time in which to assert the federal cause of action under §1983? Koshkonong v. Burton, and Wheeler v. Jackson, supra. Circumstances relevant to this inquiry include: (i) federal policies behind §1983 and state policies of repose underlying the limitation period; (ii) the plaintiff's prior knowledge of the governmental action being challenged; (iii) the effect of related rules of repose, i.e., tolling, revival, relation-back, etc.; and (iv) actions by the plaintiff indicating the reasonableness of the limitation period.

III. THE STATUTORY LIMITATION PERIOD APPLIED BY THE TRIAL COURT IN THE CASE AT BAR IS MOST CLEARLY ANALOGOUS TO THE PLAINTIFFS' CAUSE OF ACTION AND IS CONSISTENT WITH THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Use of the approach suggested in Argument II to analyze the state statute of limitations applied by the trial court in the case at bar to the plaintiffs" federal civil rights claims clearly supports the conclusion that the Fourth Circuit erred in reversing the trial court's decision. Rather than identifying the "most analogous state cause of action" and the consistency of its applicable statute of limitations with the Constitution and laws of the United States, the court concluded, as it had in McNutt v. Duke Precision Dental and Orthodontic Laboratories, Inc., 698 F.2d 676 (4th Cir. 1983), that the Maryland legislature could not have

intended that the limitation period in Md. Ann. Code, Article 49B, §9(a), be applied to civil actions for discrimination. Grattan v. Burnett, 710 F.2d 160, 162. (4th Cir. 1983).

Amicus respectfully submits that with the exception of state statutes of limitations specifically enacted for federal civil rights actions, considerations of state legislative intent are irrelevant to any analysis of the consistency of a particular limitation period with federal law. The court below should have examined (1) whether the state cause of action and its limitation period are most analogous to the §1983 cause of action, Tomanio, 446 U.S. at 487, 64 L.Ed.2d at 449, and (2) whether the limitation period is "inconsistent" with the Constitution and other federal laws. In their Petition for Writ of Certiorari, counsel

for the State of Maryland ably demonstrated how the only other analogous state cause of action available to plaintiffs, a civil action by a public employee seeking a writ of mandamus for employment discrimination based on race, would be barred by laches after five and one-half months. Petition for Writ of Certiorari and Appendix, p. 12. The limitation period selected by the trial court as most analogous is six-months in length.

Amicus respectfully urges the Court to reject the Fourth Circuit's misplaced reliance on state legislative intent in examining the causes of action and limitation periods suggested by the State of Maryland. Rather, the Court should examine whether application of either limitation period would be inconsistent with the Constitution or laws of the United States. 42 U.S.C. §1988. Although not

mentioned directly, there can be little doubt from the Fourth Circuit's opinion that this was the critical factor that motivated its rejection of the shorter state limitation periods.

In regard to the discrimination prong of the inconsistency inquiry suggested by Campbell v. Haverhill, supra, there is no indication that application of either of the state limitation periods of 165 days (Md. Ann. Code, Article 64A, §33) or six months (Md. Ann. Code, Article 49B, §9(a)) would discriminate against the assertion of the plaintiffs' federal civil rights causes of action. As discussed in petitioners' Petition for Writ of Certiorari, a claim by a Maryland public employee of employment discrimination could be asserted under various

state causes of action.[10] Maryland law requires the prompt assertion of these causes of action, i.e., within six months or less. Consequently, no discrimination against the assertion of the federal civil rights claims can be said to exist if the six-month limitation period is "borrowed."

The second prong of any analysis for "inconsistency" between a state limitation period and federal law requires asking whether, under all the circumstances, including the state policies underlying the limitation period and the policies underlying §1983, the state law afforded the plaintiffs a reasonable time within

[10]These actions include mandamus, an action under Maryland's classified state employee grievance procedure law (Article 64A), an action under Code of Maryland Regulations §06.06.0160 for unclassified employees, or an action under Maryland's Human Relations Law (Article 49B).

which to bring the action. Perhaps the strongest argument that, under the circumstances, the proposed state limitation periods afforded plaintiffs a reasonable time within which to bring their federal civil rights actions is that they did file charges of discrimination with the U.S. Equal Employment Opportunity Commission within the six-month limiation period required by Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e(5)(e).

Title VII in no way prevented plaintiffs from initially or later commencing actions pursuant to 42 U.S.C. §§1981 and 1983. Johnson, 421 U.S. at 459, 95 S.Ct. at 1719; Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971); and Curran v. Portland Super. Sch. Committee, Etc., 435 F.Supp. 1063, 1081 (D.Me. 1977). They simply chose not to do so. Plaintiffs' ability to file their claims in a timely

manner under Title VII, however, indicates that the court below erred in concluding the period was inadequate.

Secondly, as argued by the State of Maryland and acknowledged by the Court in Tomanio, Robertson, and Johnson, supra, and cases cited therein, the state policies favoring early repose in employment discrimination actions deserve considerable weight. Public employees in Maryland who experience discrimination in the workplace have an array of federal and state remedies available to them. The Maryland state legislature has simply concluded that it is in the interest of the people of Maryland that claims of employment discrimination under state law be promptly asserted and resolved.

As noted by the State of Maryland, it is not alone in this regard. The legislatures of at least 30 states, including

Kansas, have adopted similar limitation periods which have not proved to be obstacles to employment discrimination actions. This history of widespread state legislative action in the area of employment discrimination and the similarity of such limitation periods indicate that any concern about the possible inconsistency between these laws and the policies of deterrence and compensation underlying §1983 is simply unfounded.

Due to the absence of any discriminatory impact or inconsistency with the Constitution and laws of the United States, amicus respectfully urges the Court to give deference to the judgment of the Maryland state legislature that causes of action for public employment discrimination be asserted and resolved promptly. Indeed, little additional justification for this valid state policy is

needed when the Court considers that plaintiffs' Title VII claims and state claims were filed some seven years ago.

CONCLUSION

For the reasons stated above, the judgment of the Court below should be reversed.

Respectfully submitted,

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January 5, 1984

No. 83-264-CFX
Status: GRANTED

Title: Calvin W. Burnett, etc., et al., Petitioners
v.
James R. Grattan and Adrienne S. Hedman

Docketed:
August 17, 1983

Court: United States Court of Appeals
for the Fourth Circuit

Counsel for petitioner: Zarnoch, Robert A.

Counsel for respondent: Laskin, Sheldon H.

Entry	Date	Note	Proceedings and Orders
1	Aug 17 1983	G	Petition for writ of certiorari filed.
2	Aug 22 1983		Waiver of right of respondents James R. Grattan, et al. to respond filed.
3	Sep 7 1983		DISTRIBUTED. September 26, 1983
4	Sep 21 1983	F	Response requested.
5	Oct 24 1983		Brief of respondents James R. Grattan, et al. in opposition filed.
6	Oct 26 1983		REDISTRIBUTED. November 11, 1983
8	Nov 14 1983		Petition GRANTED.
			**********
9	Nov 25 1983		Record filed.
10	Nov 25 1983		Certified original record on appeal & C. A. proceedings received, 2 volumes.
12	Dec 13 1983		Order extending time to file brief of petitioner on the merits until January 5, 1984.
13	Jan 5 1984		Brief of petitioners Calvin W. Burnett, et al. filed.
14	Jan 5 1984		Joint appendix filed.
15	Jan 5 1984		Brief amicus curiae of League of Kansas Municipalities filed.
17	Jan 18 1984		Order extending time to file brief of respondent on the merits until February 20, 1984.
18	Feb 14 1984		SET FOR ARGUMENT. Monday, March 26, 1984. (2nd case)
19	Feb 21 1984		Brief of respondents James R. Grattan, et al. filed.
20	Feb 27 1984		CIRCULATED.
21	Feb 22 1984		Brief amicus curiae of ACLU filed.
22	Mar 19 1984	X	Reply brief of petitioners Calvin W. Burnett, et al. filed.
23	Mar 26 1984		ARGUED.